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THE New York Court of Appeals has, in the case of Rogers v. City of Buffalo, considered the validity of the civil service reform law of that State and has rendered an interesting opinion reviewing the whole question of civil service reform and upholding its constitutionality. As stated by the court the intent of the civil service reform system is to relieve the appointee from constant anxieties as to his future means of livelihood and to leave the appointing power at leisure without a constant drain upon his time and temper in attending to the claims of office seekers. In the opinion of the court these two most desirable results will be fully accomplished when civil service regulations pervade every part of this land.

There were three points raised, by the opponents of the law, before the court. It was urged that the civil service law was unconstitutional because it provides, that of the three State civil service commissioners not more than two shall be adherents of the same political party.

The constitution forbids that the disfranchisement or deprivation of the "rights or privileges secured to any citizen, unless by the law of the land or the judgment of his peers." The argument of the appellant was that, when two civil service commissioners belonging to one party were in office, all other members of the same party were rendered by the law absolutely ineligible and were disfranchised as to the third commissionership. The court overrules this. It cites the case of the State railroad commission and the State board of arbitration as similar instances of the creation of non-partisan boards, and says that none of these have yet been held to be unconstitutional. And it thinks the civil service board is not constituted in violation of the constitution.

The next objection was, that all city officers must constitutionally be elected by the electors of the city, or be appointed by some of the city authorities, whereas the civil service law directs the mayor to prepare general rules under which city officers are to be selected, and these rules are of no effect until approved by the State commissioners; therefore the powers of the city officials are subordinated to those of State authorities. The court thinks not, and rules against this point.

The third objection was, that the constitution prescribes a certain oath of office and declares that "no other oath, declaration or test shall be required as a qualification for any office of public trust." Whereas other tests and qualifications are required and imposed by civil service examinations and certificates of rating. The court thinks the framers of the constitution did not mean to exclude civil service tests, but only had in mind the English test oaths and religious uniformity acts, and intended to guard against their being required here.

IT seems that the validity of the so-called worsted law, authorizing the secretary of the treasury to classify as woolen cloths all imports of worsted cloth, passed some months ago by congress, is to be tested in the courts. Upon the application of an importing firm, Judge Lacombe, of the United States Circuit Court at New York, has granted an order requiring the government officials to file in the court all documents on which they have based their action in enforcing the duty on certain consignments of cloths imported by them. The decision to be rendered will involve the constitutional right of the speaker of the house of representatives to count a quorum in part from among members present and not voting. The question has been passed upon by the board of appraisers, who took the ground that it could not go behind the fact of the attestation of the law by the president of the senate and the speaker of the house, and its approval by the president, all of which were regular, to determine whether or not in its passage the house violated any parliamentary rule or precedent. The board argued that the house has the power to authorize its journals to be so prepared as to show a quorum to be present, although many of those included to make up a quorum are silent when a vote is taken by ayes and nays and refuse themselves to record their votes. In the view of the board this authority follows by implication from the power of the house to

keep a journal of its own proceedings which carries with it the power to make such a journal speak the truth, from its power to compel the attendance of absent members, which also implies the authority to utilize their attendance after their corporal presence is enforced, and from the power of the house to make its own rules of parliamentary procedure, which would seem to embrace the authority to adopt any mode of ascertaining the presence of a quorum in the house within the discretion of that body, not expressly or impliedly prohibited by the constitution. It will be of interest to note what the courts have to say upon the subject.

NOTES OF RECENT DECISIONS.

CRIMINAL EVIDENCE — WITNESS — INSPECTION OF THE BODY—CONSTITUTIONAL LAW.—An interesting question in criminal practice came before the Supreme Court of Indiana in O'Brien v. State, 25 N. E. Rep. 138, where it was held that where a defendant when arrested is compelled to submit his body to inspection in order to discover his identity, the person making such inspection may testify on the trial as to the marks found by him on defendant's body, since the giving of such testimony is not compelling defendant to testify against himself. Berkshire, C. J., says:

William Dillon was called and examined as a witness on behalf of the State. The appellant was in jail in the town of Ashland, State of Wisconsin. The witness and one Rosebrough were sent there to ascertain if he was the James O'Brien named in the indictment, and, if so, to take steps for his removal to Huntington county to answer to said indictment. When the witness and Rosebrough arrived at the jail where the appellant was confined, in the presence of the jailer they requested of the appellant permission to make an examination of his body for certain marks or scars thereon to be found, if he was the person accused in said indictment as James O'Brien, and the appellant refusing to grant the request, he was handcuffed, and the proposed examination made forcibly, and against his will. It was as to the marks and scars which the witness claimed to have discovered from said examination that the State proposed to have him testify. To the offered testimony the appellant objected, stating several grounds of objection, but as none of them were sufficiently specific to present any question for our consideration, save one, we shall confine ourselves to the question presented. It is contended that the proposed testimony was within the inhibition found in the last clause of section 14, of article 1 of our State constitution, and which reads as follows: "No person in any criminal prosecution shall be compelled to testify against himself." We are not called upon to decide whether or not the court could, at the trial or anterior thereto, have compelled the appellant to submit to an examination, that the information thus obtained might be used as evidence against him on the trial, and express no opinion upon that question. But for a learned discussion of the question *pro* and *con*, see State v. Ah Chuey, 14 Nev. 79, 33 Amer. Rep. 530, and note; Blackwell v. State, 67 Ga. 76; Stokes v. State, 5 Baxt. 619. Nor was the testimony offered as to information obtained to be used upon the trial but, as we have already seen, with a view to his arrest. The question of duress and its effect upon information thereby obtained, is not involved, for the facts to which the witness was called to testify did not depend upon a confession made by the appellant, nor upon any act of his. The marks and scars upon the body had no relation to the force used to enable the witness to find them. The case is much like the examination of a person under arrest for concealed weapons with which he could have committed the crime of murder of which he is accused, or for stolen property, where he is accused of larceny, and the right to examine the accused for such purpose has never been questioned. The conclusion can only be reached that the offered testimony was within the constitutional prohibition, upon the theory that the witness was the mere mouthpiece, and that the appellant was the real witness, which would be a strained construction of the constitutional provision as applied to the offered testimony. In construing the constitution the courts should follow the ordinary import of the language employed, unless there are controlling reasons indicating that a different construction was intended. Worcester says that the word "testify" has three definitions: "(1) To make a statement or declaration in confirmation of some fact; to bear witness. (2) To give evidence of testimony in regard to a case depending in a court or tribunal. (3) Law. To make a solemn declaration under oath or affirmation before a tribunal, court, judge, or magistrate for the purpose of proving some fact." The last of these is from Burrill's Law Dictionary. Webster's definition is substantially the same. To hold that the testimony of the witness was incompetent would compel us, in every case involving the identity of a person accused of crime, to hold that testimony as to marks and scars hidden under the clothing which he wears is inadmissible, if the information of the witness was obtained without the consent of the accused, no difference under what circumstances, or in what manner, obtained. The textbooks throw but little light upon this question under consideration, and yet we are not entirely without authority. See State v. Garrett, 71 N. C. 85, and State v. Graham, 74 N. C. 646. The syllabus of that case is as follows: "An officer who had arrested a prisoner charged with larceny compelled him to put his foot in a track found near where the larceny was committed, and testified as to the result of the comparison: *Held*, that the evidence was not procured by duress, and was admissible." See also Walker v. State, 7 Tex. App. 245.

CARRIERS OF PASSENGERS—LOSS OF BAGGAGE.—The case of Metz v. California South. R. Co., 24 Pac. Rep. 610, decided by the Supreme Court of California, is a fair illustration of what does and what does not constitute "baggage," for the loss of which a

carrier is responsible. It was there held that a man traveling alone, and carrying in his trunk for transportation a quantity of ladies' jewelry, cannot recover for the loss thereof against a common carrier. Sharpstein, J., says:

Common carriers are required to receive and carry a reasonable amount of luggage for each passenger without charge. Civil Code, § 2180. "Luggage may consist of any article intended for the use of a passenger while traveling, or for his personal equipment." *Id.* § 2181. Before the enactment of this Code, courts acknowledged the difficulty of defining with accuracy what should be deemed luggage within the rule of the carrier's liability, and we think this provision of the Code has disincumbered the subject little, if any, of the difficulty which previously surrounded it. If we define the word "equipment" as Webster defines it, viz., "the act of equipping or being equipped, as for a voyage or expedition," it adds nothing to what had long before been understood as comprehended in the term "luggage". In Railroad Co. v. Swift, 12 Wall. 272, the court, speaking through Mr. Justice Field, said that the contract to carry "only implies an undertaking to transport such a limited quantity of articles as are ordinarily taken by travelers for their personal use and convenience, such quantity depending, of course, upon the station of the party, the object and length of his journey, and many other considerations." To the same effect is a decision of the queen's bench in Macrow v. Railway Co., L. R. 6 Q. B. 621, where Chief Justice Cockburn announced the true rule to be "that whatever the passenger takes with him for his personal use or convenience, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or to the ultimate purpose of the journey must be considered as personal "luggage." It is not found that the plaintiff carried those articles for his personal wear or convenience with reference to his immediate necessities or to the ultimate purpose of his journey, but it is found that he was carrying them for transportation; and it is found that they were proper articles of luggage and baggage for the plaintiff to carry as such. We are not prepared to hold that a gentleman traveling without a wife or other female companion would ordinarily, no matter what his rank or station in life might be, carry as baggage for his personal use or convenience a quantity of ladies' jewelry, or that if he did carry it, and it was lost, he could recover the value of it of a common carrier who had no knowledge of its being among the contents of a trunk which was being carried as luggage. In one case, McGill v. Rowand, 3 Pa. St. 451, the Supreme Court of Pennsylvania, *held* that where a man was traveling with his wife, whose jewelry was in a trunk which was being transported as baggage, and was lost, the husband was entitled to recover of the common carrier its value. In that case it might well have been held that the jewelry "was intended for the use of a passenger while traveling." The Supreme Court of the United States, in Railroad Co. v. Fraloff, 100 U. S. 24, says: "Whether articles of wearing apparel in any particular case constitute baggage, as that term is understood in the law, for which the carrier is responsible as insurer, depends upon the inquiry whether they are such in quantity and value as passengers under like circumstances ordinarily or usually carry for personal use when traveling." "The implied undertaking," says Mr. Angell, "of the proprietors of stage-coaches, railroads, and steam-boats, to carry in safety the baggage of passengers, is not unlimited, and cannot be extended beyond ordinary baggage, or such baggage as a traveler usually carries with him for his personal convenience." Ang. Carr. § 115. In Pfister v. Railroad Co., 70 Cal. 169, 11 Pac. Rep. 686, this court had occasion to consider the provisions of the Code above cited, but the question in that case was whether a passenger was entitled to carry a large sum of money as baggage. It was held that he was not. But that decision in no way aids us in the solution of the question involved in this case.

CONDITIONAL SALES—INSTALLMENTS—LEASE.—The Supreme Court of Georgia, in Hays v. Jordan, 11 S. E. Rep. 833, considered the effect of sales of personal property made upon the installment plan. In that case the plaintiffs had delivered to the defendant a piano, she giving her notes "for value received for the rent" of the piano. The title was to be retained by the plaintiff until these notes were paid, but upon the payment of the notes "given for the use of the piano," title was to pass to the lessee. Upon default in payment the piano was to be returned. This contract the court held to be a conditional sale and not a lease, and upon recovery of this piano, for which plaintiff sued, the money already paid should be returned, after deducting a proper amount for the use of the piano. Simmons, J., says:

Although the contract does use the term "rent," and states that the notes are given for the "use" of the piano, we do not so construe it, but regard it, not as lease or renting, but as a conditional sale, with title reserved in the vendor until the purchase-price is paid. Guilford v. McKinley, 61 Ga. 232. The entire $350, styled "rent," is made payable within six months from the date of the transaction, and is the stipulated value of the piano, and the consideration for a bill of sale to be given when the full amount is paid; and the sale of the piano, and not the renting thereof, is evidently the real end and basis of the contract. The Supreme Court of the United States, in passing upon a similar contract, say: "Nor is the transaction changed by the agreement assuming the form of a lease. In determining the real character of a contract courts will always look to its purpose rather than to the name given it by the parties." Hervey v. Locomotive Works, 93 U. S. 672. Mr. Justice Davis, in the opinion, cites, Murch v. Wright 46 Ill. 487, in which it was held, as to a contract of this character, "that it was a mere subterfuge to call the transaction a lease," and says: "It is true the instrument of conveyance purports to be a lease, and the sums stipulated to be paid are for rent; but this form was used to cover the real transaction as much so as was the rent of the piano in Murch v. Wright. There the price of the piano was to be paid in thirteen months, and here that of the engine * * * in one year. It was evidently not the intention that this large sum should be paid as rent for the mere use of the engine for one year. If so, why agree to sell and convey the full

title on the payment of the last installment? In both cases the stipulated price of the property was to be paid in short installments, and no words employed by the parties can have the effect of changing the true nature of the contract."

The courts now uniformly hold that such contracts are not leases, but are conditional sales. It was so held where parties expressly contracted "that no agreement of sale of said piano-forte is implied." Gerow v. Costello, 11 Colo. 560. See also Miller v. Steen, 30 Cal. 402; Manufacturing Co. v. Cole, 4 Lea, 439; Knittel v. Cushing, 57 Tex. 354, s. c., 34 Am. Rep. 498; Loomis v. Bragg, 50 Conn. 228, s. c., 47 Am. Rep. 638; Manufacturing Co. v. Graham, 8 Oreg. 17; Lucas v. Campbell, 88 Ill. 447; Greer v. Church, 13 Bush, 430; Gerrish v. Clark (N. H.), 13 Atl. Rep. 870; Garham v. Holden (Me.), 9 *Id.* 894; Currier v. Knapp, 117 Mass. 324; Carpenter v. Scott, 13 R. I. 477; Sage v. Sleutz, 23 Ohio St. 1; Machine Co. v. Holcomb, 40 Iowa, 33; De Saint Germain v. Wind (Wash. T.), 13 Pac. Rep. 753; Whitcomb v. Woodworth, 54 Vt. 544; Hintermister v. Lane. 27 Hun, 497.

The contract being then a conditional sale, and not a lease, and the payments made thereunder not rent but purchase-money, the plaintiffs have no right to retain them as rent; and there is no express stipulation that they shall be treated as a forfeiture. "Forfeitures are abhorred in equity and are never favored in law," and provisions for forfeitures are regarded with disfavor, and construed with strictness when applied to contracts, and the forfeiture relates to a matter admitting of compensation or restoration. Where adequate compensation can be made, the law in many cases, and equity in all cases, discharges the forfeiture upon such compensation being made. The law inclines to remedy breach of condition by damages rather than by forfeiture. Code, sec. 2295; Story Eq. Jur., secs. 1312, 1314, 1316, *et seq.*

On a sale reserving title till the price is paid, many of the cases hold that partial payments are forfeited on default of the residue, but in courts possessing equity powers the modern tendency is to allow the seller who rescinds a contract for default after receiving a part of the price to retain only so much as will compensate him. Newm. Sales, sec. 306; Preston v. Whitney, 23 Mich. 260, 267; Johnston v. Whittemore, 27 *Id.* 463, 470. In this case, under the practice in this State, it was within the power of the court to mould the verdict so as to do full justice to the parties, and in the same manner as a decree in equity. Code, secs. 3082, 3562; Acts 1884-85. 36; Acts 1887, 64. Although the plaintiffs elected to take the piano, and not to take a money verdict for damages, as they had a right to do under section 3564 of the code, yet we do not think that they were entitled to recover the piano and retain all the money received from the defendant. We think that under our law the court should have instructed the jury to so mould their verdict as to do justice to all parties, and should have instructed them that if the plaintiffs elected to take the specific property, and a part of the purchase-money had been paid, the plaintiffs were entitled to recover the property itself; but before they could recover they must return the money which the defendant had paid them, after deducting a proper amount for the use of the piano, if the use was of any value to the defendant, which amount the jury should arrive at from the evidence, finding the balance, with interest, in favor of the defendant against the plaintiffs, the piano to be returned to the plaintiffs, upon payment to the defendant of the amount thus found. To same effect, Latham v. Sumner, 89 Ill. 233, s. c., 31 Am. Rep. 79; Hine v. Roberts, 48 Conn. 267, s. c., 40 Am. Rep. 170, notes; 31 Am. Rep. 81, 40 *Id.* 21.

CONSTITUTIONAL LAW—OPIUM SMOKING.—The question as to the constitutional rights of a Chinaman, or indeed any one else, to inhale or smoke opium contrary to the statute, came before the Supreme Court of Washington, in Territory v. Ah Lim, 24 Pac. Rep. 588, where it was held that Laws Wash. T. 1883, p. 30 (amendatory of Code Wash. T. 1881, ch. 149, § 2073), providing that "any person or persons who shall smoke or inhale opium, * * * shall be deemed guilty of a misdemeanor," is not unconstitutional as being in violation of the inalienable rights of individuals to life, liberty, and pursuit of happiness. Scott and Stiles, JJ., dissented from this conclusion in a very vigorous opinion. Dunbar, J., says:

In the case at bar, no special constitutional limitation or inhibition is pointed out with which the law in question is in conflict; but it is contended by the defense that the right of liberty, and pursuit of happiness, is violated by the prohibition of any act which does not involve direct and immediate injury to another. Counsel for appellant says in his brief that the parent may be compelled to send the child to school so many months in the year; the State may prescribe his studies, and may tax the people to the verge of bankruptcy to mould the infant's mind to their liking; but this right, he urges, is on the ground that the child is the ward of the State, and that such jurisdiction ceases when it becomes of age. It is difficult to see how the question of inalienable rights can be affected by age, when the law prescribes the age at which the ward arrives at his majority, and the time at which the inalienable rights attach. Doubtless the true theory on which compulsory education is sustained is that the State has an interest in the intellectual condition of each of its citizens, recognizing the fact that society is but an aggregation of individuals, and that the moral or intellectual plane of society is elevated or degraded in proportion to the plane occupied by its individual members, and that the education is not compelled for the benefit of the child during its minority, or for its exclusive benefit after its majority. The State has an undisputed right to, and does, provide gymnasium attachments to its schools, and prescribes calisthenic exercises for the muscular development of school children. The object to be attained is not for the exclusive benefit of the child. The State has an interest in the health of its citizens, and has a right to see to it that its citizens are self-supporting. It is burdened with taxation to build and maintain jails and penitentiaries for the safe-keeping of its criminals, and to protect its law-abiding subjects from their ravages. It is taxed to maintain insane asylums for the safe-keeping and care of those who become insane through vicious habits or otherwise. It is compelled to maintain hospitals for its sick, and poor-houses for the indigent and helpless; and surely it ought to have no small interest in, and no small control over, the moral, mental, and physical condition of its citizens. If the State concludes that a given habit is detrimental to either the moral,

mental, or physical well-being of one of its citizens, to such an extent that it is liable to become a burden to society, it has an undoubted right to restrain the citizen from the commission of that act; and fair and equitable consideration of the rights of other citizens make it not only its right, but its duty, to restrain him. If a man willfully cuts off his hand, or maims himself in such a way that he is liable to become a public charge, no one will doubt the right of the State to punish him; and if he smokes opium, thereby destroying his intellect, and shattering his nerves, it is difficult to see why a limitation of power should be imposed upon the State in such a case. But it is urged by the defense that a moderate use of opium or that the moderate use of an opium pipe, is not delecterious, and consequently cannot be prohibited. We answer that this is a question of fact, which can only be inquired into by the legislature. Smoking opium is a recognized evil in this country. It is a matter of general information that it is an insiduous and dangerous vice, a loathsome, disgusting, and degrading habit, that is becoming dangerously common with the youth of the country, and that its usual concomitants are imbecility, pauperism, and crime. It has been regarded as a proper subject of legislation in every Western State; and it is admitted by counsel in defense, in the argument of this case, that the statute in relation to the suppression of joints kept for the purpose of smoking opium was constitutional and right.

Granted that this is a proper subject for legislative enactment and control, no limit can be placed on the legislative discretion. It is for the legislature to place on foot the inquiry as to just in what degree the use is injurious, to collate all the information, and to make all the needful and necessary calculations. These are questions of fact, with which the court cannot deal. The constitutionality of laws is not thus to be determined.

CRIMINAL PRACTICE — FORMER ACQUITTAL—MUNICIPAL ORDINANCES.—The Supreme Court of Arkansas, in Town of Van Buren v. Wells, 14 S. W. Rep. 38, decide that a conviction under a statute for carrying concealed weapons is not a bar to a prosecution for the same act under a city ordinance. Battle, J., says:

But many courts have held that a municipal corporation can only pass ordinances punishing the same acts which are punishable under the general laws of the State when expressly authorized to do so, and that no such authority will be presumed from a grant of power general in its nature. If this be true, it must be because the effect of such ordinances is to supersede the general laws upon the same subject. We cannot see any good reason why such authority, fitting and proper to be delegated to a municipal corporation, and plainly conferred in general terms, cannot be exercised by the municipality, unless it be because it is inconsistent with the general laws. That is the effect of the authorities which hold it cannot be. Many of them say that the effect of such ordinances, if enforced, would be to oust the State of jurisdiction, or make the same offense punishable twice—once by the State, and once by the corporation—contrary to the constitution, and therefore they are invalid. *In re* Sic, 73 Cal. 142, 14 Pac. Rep. 405; Jenkins v. Thomasville, 35 Ga. 145; Mayor v. Hussey, 21 Ga. 80; Adams v. Albany, 29 Ga. 56; Vason v. Augusta, 38 Ga. 542; Reich v. State, 53 Ga. 73; Foster v. Brown, 55 Iowa, 686, 8 N. W. Rep. 654; Washington v. Hammond, 76 N. C. 33; State v. Langston, 88 N. C. 692; State v. Brittain, 89 N. C 574; State v. Keith, 94 N. C. 933; *Ex parte* Smith, Hemp. 201; *Ex parte* Bourgeois, 60 Miss. 663.

But we do not think the ordinances in question are invalid because they make offenses twice punishable. Municipal corporations "are bodies politic and corporate, vested with political and legislative powers for the local civil government and police regulations of the inhabitants of the particular districts included in the boundaries of the corporations." In some respects, they are local governments established by law to assist in the civil government of the country. They are founded in part upon the idea that the needs of the localities for which they are organized, "by reason of the density of population or other circumstances, are more extensive and urgent than those of the general public in the same particulars. Many acts are often far more injurious, while the temptation to do them are much greater in such localities than in the State generally. When done in such localities, they are not only wrongs to the public at large, but are additional wrongs to the corporations. To suppress them when it can be done, and, when there is a failure to do so, to punish the guilty parties, in many cases, form a part of the duties of such corporations. Many of them can and ought to be made penal by the incorporated cities and towns, although they are already made so by the statute. It sometimes becomes necessary for them to do so, in order to accomplish the objects of their organization. When made penal by the State and the city or town, each act becomes a separate offense against the State and the municipality. In that event the penalty imposed by the city or town is superadded to that fixed by the general law, on account of the additional wrong done, for the offense against the municipality. In such a case the wrong-doer would not be twice punished for the same offense. In Moore v. Illinois, 14 How. 19, the Supreme Court of the United States held that the passing of a counterfeit coin, which was punishable under the federal law, might be punished by the State as a crime, and that the same act was an offense against the federal government and against the State government. In delivering the opinion of the court, Mr. Justice Grier said: "An 'offense,' in its legal signification, means the transgression of a law. A man may be compelled to make reparation in damages to the injured party, and be liable also to punishment for a breach of the public peace, in consequence of the same act, and may be said, in common parlance, to be twice punished for the same offense. Every citizen of the United States is also a citizen of a State or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. * * * That either or both may, if they see fit, punish such an offender, cannot be doubted. Yet it cannot be truly averred that the offender has been twice punished for the same offense, but only that by one act he has committed two offenses, for each of which he is justly punishable. He could not plead the punishment by one in bar to a conviction by the other."

Judge Cooley says; "Indeed, an act may be a penal offense under the laws of the State, and further penalties, under proper legislative authority, be imposed for its commission by municipal by laws; and the enforcement of the one would not preclude the en-

forcement of the other;" and further says: "Such is the clear weight of authority, though the decisions are not uniform." Cooley, Const. Lim. 199, and cases cited; Mayor v. Allaire, 14 Ala. 400; Hughes v. People, 8 Colo. 536, 9 Pac. Rep. 50; Wragg v. Penn Tp., 94 Ill. 11; Ambrose v. State, 6 Ind. 351; Williams v. Warsaw, 60 Ind. 457; Town of Bloomfield v. Trimble, 54 Iowa, 399, 6 N. W. Rep, 586; Shafer v. Mumma, 17 Md. 331; Wayne Co. v. Detroit, 17 Mich. 399; State v. Oleson, 26 Minn. 507, 5 N. W. Rep. 959; State v. Lee, 29 Minn. 445, 13 N. W. Rep. 913; St. Louis v. Bentz, 11 Mo. 61; St. Louis v. Cafferata, 24 Mo. 94; Linneus v. Dusky, 19 Mo. App. 20; City of Kansas v. Clark, 68 Mo. 588; *Ex parte* Hollwedell, 74 Mo. 395; St. Louis v. Vert, 84 Mo. 204; City of Brownville v. Cook, 4 Neb. 101; Howe v. Treasurer, 37 N. J. Law, 145; State v. Bergman, 6 Oreg. 341; State v. Williams, 11 S. C. 288; Greenwood v. State, 6 Baxt. 567; State v. Taxing District, 16 Lea, 240; Hamilton v. State, 3 Tex. App. 643; McLaughlin v. Stephens, 2 Cranch, C. C. 148; U. S. v. Wells, *Id.* 45; U. S. v. Holly, 3 Cranch, C. C. 656.

In Bish. St. Crimes, it is said: "If the statute so authorizes, it is not apparent why a citizen corporation may not impose a special penalty for an act done against it while the State imposes also a penalty for the same act done against the State." 1st. ed. § 23.

In Brizzolari v. State, 37 Ark. 364, the validity of an ordinance passed by the common council of the incorporated town of Ft. Smith on the 23d of December, 1873, declaring that it shall be deemed a misdemeanor for any able-bodied person to be found within the limits of the corporation having no visible or apparent means of subsistence, and neglecting to apply himself to some honest calling, punishable by fine, came in question. It was insisted that this ordinance was abrogated by the adoption of the constitution of 1874. This court held that, although the constitution of 1874 vested exclusive original jurisdiction, in all matters relating to vagrants, in the county courts, it did not repeal the ordinance; that the jurisdiction vested in the county courts as to vagrants extended "only to such matters of police regulations as are designed to prevent them from becoming burdensome to the county, or in their nature local, or of special concern to the county," thereby virtually holding the doctrine laid down by Judge Cooley.

The ordinances in question, are, therefore, not inconsistent with the general laws of the State upon the same subject, nor do they oust the State of any jurisdiction, if enforced, by making the same acts punishable, and are not invalid for these reasons.

FEDERAL OFFENSE — POSTAL LAWS—UNMAILABLE MATTER.—The United States Circuit Court for Vermont recently, in the case of United States v. Brown, 43 Fed. Rep. 135, construed the United States statute on the subject of the mailing of threatening letters or envelopes containing threatening epithets. It was held that mailing a letter enclosed in an envelope, on which the words "Excelsior Collection Agency" are printed in very large full-faced capital letters which occupy more than half the envelope, and are so placed as to be entirely separate from the direction, to return to the sender is a violation of 25 St. at Large, U. S. 496, Ch. 1039, which forbids mailing any envelope on which appears any delineation, epithet, or language calculated and intended by its terms, manner, or style of display to reflect injuriously on the character or conduct of another. Wheeler, J., says:

The respondent is indicted for depositing for mailing and delivery matter upon the envelope of which the words "Excelsior Collection Agency" were printed in large letters, and calculated, by the terms, manner, and style of display, and obviously intended, to reflect injuriously upon the character and conduct of the person addressed. He has demurred to the indictment, and raised the question whether those words are capable of being so displayed upon an envelope or wrapper of mail matter as to be calculated, and obviously intended, to reflect injuriously upon the character or conduct of another person. If they can be, they are well charged in the indictment to have been so displayed as to be so calculated and obviously intended. To make the matter non-mailable, and constitute the offense that the delineation is calculated and obviously intended to so reflect, must be apparent from an inspection of the envelope. The design and intention must appear from that, and not from extrinsic facts averred or shown. The reflection upon character or conduct must come from seeing the envelope. The question here is whether it would come from seeing this envelope addressed to a person as mail matter. The sending of letters with those words on the outside to a person would lead to the inference that the character, or conduct, or both, of the person sent to, in respect to the fulfillment of pecuniary obligations, was such as to make the sending necessary or justifiable, unless they should be so restricted by connection with other words as to show that they were used for directions to return if not called for, or other legitimate purpose, not referring to the person addressed. The manner of display might indicate clearly whether the words were placed there for injurious reflection upon that person, or for legitimate transmission of the contents of the envelope through the mails. The indictment shows that the manner of this display indicated intended reflection. The indictment, therefore, appears to be sufficient. Whether the display of words upon the envelope would support the averments of the indictment would be a question of fact for a jury.

The respondent's counsel and the district attorney have submitted a sample envelope printed like the one in question, upon a suggestion that if, in the opinion of the court, it would warrant a verdict of guilty, the respondent would plead guilty in answering over upon the overruling of the demurrer, although he was ignorant of the statute, and innocent of all intention to violate any law. Upon this sample the words "Excelsior Collection Agency" are printed in very large full faced capital letters, which occupy more than the upper half of the envelope; are separate from directions to return to the respondent if not called for, in the lower left-hand corner; and were obviously placed there to attract attention, and reflect delinquency in making payments upon the person sent to. The object probably was to make the person pay up to avoid repetition of the reflection. The depositing of mail matter for delivery with such words so displayed upon the envelope would seem clearly to constitute an offense within the act of 1888, which appears to be aimed at all use injurious to the feelings of others of the outside of mail matter.

SPLITTING CAUSES OF ACTION.

Two Ancient Maxims, Origin and Purpose.—No maxims of the law are more firmly established than the two which prevent repeated litigation between the same parties respecting the same cause of action, namely: Interest *rei publicæ sit finis litum*, and *nemo debit bis vexari pro una et eadam causa.*[1] No other two have been such a fruitful source of conflicting and confusing decisions in the application of their doctrines to adjudged cases.[2] The origin and the object of the rules crystallized in these maxims, was the prevention of the vexations, to the public as well as individuals, incident to a multiplicity of suits which the law as well as equity contemns. The latter maxim finds more familiar expression in the statement "that a party shall not split his cause of action."[3] They are applicable alike to both equitable and legal actions.[4]

A Cause of Action Defined.—Jurists have found much difficulty in precisely defining the term cause of action.[5] In its broadest legal sense, applied to a suit, it is a proceeding for the prevention or redress of a single or separate wrong.[6] A separate right on the part of one combined with the violation or infringement of such right by another.[7] It is synonymous with the term right of action,[8] though clearly distinguishable from the term choses in action.[9]

Illustration.—Thus, in the case of a simple tort (*e. g.* an assault or trespass), the cause of action is the wrongful act; in the case of a breach of contract, the cause of action consists of two things—the making of the contract and the breach of it, though the facts in each of these cases may be more or less complicated.

Some Observations on the General Doctrine of Res Judicata.—The doctrine of *res judicata*, or estoppel by judgment, which holds that a suit in any of the forms of personal actions, and a judgment on the merits, completely bars all other actions based on the same cause of action in every other form. The rule against splitting causes of action is but an application of the wholesome maxim, "that he who did not speak when he should have spoken, shall not now be heard when he should be silent." But the rule is otherwise as to real actions, because in these there were what was termed at common law higher and lower remedies, and pursuit of the lower was no bar to the higher form of action, and this doctrine still obtains. It is not the recovery, but the matter alleged by the party, and upon which the recovery is had, which creates the estoppel in any action, real or personal. In personal actions there is no gradation of the different forms of action; this distinction is assigned as the reason for excepting real actions from the operation of the rule.[10]

Illustration.—A judgment in ejectment at common law was not in any case conclusive upon the title of either of the parties.[11] The inconclusiveness of a verdict and judgment in ejectment is due to the form of the action, and not to the character of the subject-matter of the controversy.[12] But where equitable defenses are permitted in the action, it becomes a bar, so far as the equitable issues are involved, at least.[13]

Distinction Between Terms—Cause of Action, Transaction, and Count.—The term "cause of action" should not be confounded with that of the transaction or contract in which it originated, for several separate and distinct causes of action may, and frequently do arise out of a single transaction or contract.[14] Nor must the term be confused with that of "count," as is frequently done; for a party may have several counts, both at common law and under the code of one cause.[15] When, however, there is but a single count in the state-

[1] United States v. Throckmorton, 98 U. S. 615.
[2] Secor v. Sturgis, 16 N. Y. 548 (loc. cit.) 555.
[3] Moran v. Plankinton, 64 Mo, 237.
[4] Freeman on Judgments, § 248; 98 U. S. *supra.*
[5] Pomeroy Rem. 452.
[6] Bliss Code Pleadings, 1-113; Boone Code Pleadings, 36.
[7] Veeder v. Baker, 83 N. Y. 156-161; Dicey on Parties, ch. 11 (1 Am. ed.)
[8] 3 Binns Pa. 280-284.
[9] 10 How. Pr. (N. Y.) 1.
[10] Arnold v. Arnold, 17 Pick. 4; Ferrer's Case, 6 Coke, 7; Viner's Abridgment Judgment, 2; Outram v. Morewood, 3 East, 346; Roscoe on Real Actions, 38 Mo. 551.
[11] Mitchell v. Robertson, 15 Ala. 412; Pollard v. Baylors, 6 Munf. 433; Holmes v. Carondelet, 38 Mo. 551; Smith v. Sherwood, 4 Conn. 276.
[12] Stevens v. Hughes, 31 Pa. St. 381.
[13] Chouteau v. Gibson, 76 Mo. 38, 91 Mo. 320.
[14] Boyce v. Christy, 47 Mo. 70; Priest v. Deaver, 22 Mo. Appeal, 277; Kerr v. Simmons, 9 Mo. Appeal, 376; Dulaney v. Payne, 101 Ill. 325, s. c., 40 Am. Rep. 205, 92 Mo. 242.
[15] Farra v. Sherwood, 17 N. Y. 227; Grannis v. Hooker, 29 Wis. 65; Kerstetter v. Raymond, 10 Ind. 199; Stout v. St. Louis Tribune Co., 52 Mo. 347.

ment of a cause of action, "count" and "cause" are synonymous, and used interchangeably in legal parlance.[16] There may be several causes of action united in the same petition, or several defenses or counterclaims united in the answer, provided they are of the kind that may be united; but each cause of action or defense must be separately stated, and separate trials had, and separate judgments entered. The latter requirement is ths *experimentum crucis* in determining whether a pleading contains more than one cause of action, or the different counts are merely different statements of the same cause of action.[17]

Restriction of the Rule to the Same Cause of Action.—It can be safely said that the application of the maxims *supra* is confined to cases of an attempt to bring a second action founded upon the same (or part of the same) cause of action *pro una et eadam causa*, which, by the latter and more enlightened adjudication, is ordinarily restricted in its meaning to what could have been embraced, either by allegation or by proof, under the allegations in the statement of the prior cause of action, *i. e.*, could the matter have been, not whether it was adjudicated in the prior cause of action. If so, then the rule should be applied *proprie vigore*, not otherwise.[18] The true distinction between demands, rights or causes of action which are single and entire, and those which are several and distinct, is, could they all have been included in the prior statement of the cause of action; by this is not meant in the same petition or suit, for a party may have as many suits as he has causes of action, and may bring them at different times or at the same time; but if he brings them, and they are all depending at the same time and by the same tribunal, he does so subject only to the right of consolidation, if they be such as could have been united in one petition.[19]

As to Actions Ex Delicto.—All the damages which can by any possibility flow from a single tort, form an indivisible cause of action which consists of two parts—the unlawful act, and all the damages which can arise out of it; for damages alone, no action can be permitted. If a recovery has once been had, no subsequent suit can be maintained. There must be a fresh act as well as a fresh damage. The fact that the damages sought to be compensated in the second suit had not arisen when the former judgment had been obtained, does not form any exception to the rule.[20]

Exceptions to the Rule Supra Cases Adjudged.—The prohibition of the foregoing rule in action for torts, as well as on contracts, is predicated upon knowledge of the constituent elements of the cause of action sought to be divided. That other well known and frequently applied maxim of the common law, "*Lex neminem cogit ad vena seu impossibilia*," finds a fitting application, and a party should not be precluded in consequence of a former action, when such action was prosecuted to a finality, in unavoidable ignorance of the full extent of the wrongs received or injuries done; any other conclusion would be reached only through sanctioning the rankest injustice. This doctrine was announced by the Supreme Court of Missouri in Moran v. Plankinton, 64 Mo. 337. In this case the plaintiff lost seventeen hogs by theft. The defendant bought the whole number of the thief. The plaintiff found six of his hogs killed at their packing house but not cut up, and replevied them with damages. At the time of bringing this suit defendants had cut up and packed the remaining eleven, so that plaintiff could not distinguish them. As to four of the hogs it did not appear, from the agreed statement, that the plaintiff had knowledge of their conversion when he brought his first suit; he then sued plaintiff for the eleven hogs. In the circuit court the judgment was for defendants. The supreme court reversed and remanded the case, holding that plaintiff was entitled to recover as to the four hogs of whose conversion he was ignorannt at the time of bringing the first suit, citing in support of the view, the cases of Risley v. Squire, 53 Barb. 280; Bennett v. Hood, 1 Allen, 47; Freeman on Judgments, Sec. 241.[21]

[16] McGary Code Pleading.

[17] Henderson v. Dickey, 50 Mo. 161.

[18] Dulaney v. Payne, 101 Ill. 325, s. c., 40 Am. Rep. 205; Kerr v. Simmons, 9 Mo. Appeal, 376; Union R. R. and Transportation Co. v. Traube, 59 Mo. 355; Bagot v. Williams, 3 Barn. & Cress. 235.

[19] Secor v. Sturgis, 16 N. Y. 554; Perry v. Dickerson, 85 N. Y. 345.

[20] Suth. Dam. pp. 175-6; Freeman on Judgments, § 241; Farrington v. Payne, 15 Johnson, 432; Bennett v. Hood, 1 Allen, 47; Wagner v. Jacoby, 26 Mo. 532; Colvin v. Corwin, 15 Wend. 557; Kerr v. Simmons, 9 Mo. Appeal, 376.

[21] State v. Norton, 18 Mo. 53 (loc. cit.) 67; Bagot v.

As to Actions Ex Contractee.—Actions *ex delicto*, arising not from any agreement of the parties, but *in invitum*, on account of their very nature, are ordinarily indivisible, as already observed, the only exception being noted in the last paragraph; but in regard to actions on contracts being of a contrary nature, proceeding wholly from the agreement of the parties, either expressed or implied, the rule is not of such universal application as in the former; but the exceptions are many and marked, and the confusion among the decided cases increased. It may, however, be safely stated that whenever the parties have, by the contract, severed it into one or more causes of action providing for successive acts or performance, either as to time or manner, the prohibition of the rule cannot be successfully invoked so as to prevent the maintaining of a second suit on a single contract.[22] There may be in the same instrument several separate promises or undertakings for as many distinct considerations. Even one consideration often remains the same for the performance of several successive acts; *e. g.*, a note payable at the end of a year, with interest payable semi-annually, comprises two distinct causes of action—one to pay the principal at the end of the year, the other to pay the interest semi-annually; and separate suits may be maintained on the two demands, and a recovery for the interest is no bar to a subsequent suit for the principal, though both may have been due at the time of the commencement of the suit.[23]

Contrary Doctrine Adjudged Cases.—We are aware that there are cases which contravene the doctrine stated in the last preceding paragraph, notably two. The Reformed Prot. Dutch Church v. Brown, 54 Barb. 1870, and Union R. R. & Transp. Co. v. Traube, 59 Mo. 355, holding that several claims payable at different times arising out of the same contract or transaction, separate actions can be brought as each liability accrues. *Yet if no action be brought until more than one claim is due, all that are due must be included in one action; and if an action be brought when more than one is due, a recovery in the first brought will be an effectual bar to a second action brought to recover the other claims that were due when the first were brought.* That part of the doctrine in italics is not only inconsistent, but is illogical and a *non sequitur;* for if a party have two distinct and separate causes of action, distinct demands, though they arise out of the same transaction, he may have two suits at the same time or at different times, as has been demonstrated above, both on reason and the highest authority. But we are relieved from the further consideration of the case (54 Barb.), since the court of appeals of that State (in 1881), in Perry v. Dickerson, 85 N. Y. 345, which was an action by an employee against his employer, for wages due him at the time of wrongful dismissal, the employee having, in a former action, recovered damages and costs for the wrongful dismissal; decided the former action no bar, while not referring to the case in Barb. by name distinctly, repudiated that portion of the doctrine of that case italicised *supra* in a lucid and logical exposition of the doctrine; the court said: "The only question presented for our decision in this case arises upon the defense, setting up in bar of the action the judgment obtained in a justice's court, in March, 1879, for $22 besides costs, in an action brought against the defendants subsequent to February 10, 1879, for having wrongfully dismissed him from their employment on that day, in violation of their contract to employ him for the period of a year from June 22, 1878. The present action is brought for wages stipulated to be paid by the contract of employment, and earned and due at the time of the wrongful dismissal. The plaintiff, neither in his complaint nor on his trial in the justice's action, claimed to recover the wages earned. The claim for wages was expressly excluded by the terms of the complaint. It was an action solely for damages for the wrongful dismissal. On the other hand, in this action, the complaint sets out the contract of employment, alleges the rendition of services thereunder, and that the sum of $155.55 was due and owing the plaintiff therefor, for which sum judgment is demanded. There is no averment of a wrongful dismissal, and no claim for damages therefor.

Williams, 3 Barn. & Cress. 235; United States v. Throckmorton, 98 U. S. 615.

[22] Vol. I Suth. Dam. p. 177 8; Mills v. Garrison, 42 N. Y. 40; Mandeville v. Welch, 5 Wheat. 227, 59 Mo. 355, 92 Mo. 242 (loc. cit.) 250.

[23] Andover Sav. Bank v. Adams, 1 Allen, 28; Wright v. Butler, 6 Wend. 284; Dulaney v. Payne, 101 Ill. 325, s. c., 40 Am. Rep. 205; Kerr v. Simmons, 9 Mo. App. 376; State v. Martin, 18 Mo. 53; White v. Smith, 33 Pa. St. 186.

The decision of the question whether the judgment in the justice's action is a bar to this action, turns, we think, upon the point whether the claim for wages earned and due before the wrongful dismissal, and the claim for damages for such dismissal, constituted a single and indivisible demand within the authorities, or two separate and independent causes of action. It is doubtless true that the plaintiff could not have prosecuted in one action the claims for wages and for damages for the wrongful dismissal. But it is not a test of the right of a plaintiff to maintain separate actions, that all the claims might have been prosecuted in a single action. A plaintiff having separate demands against a defendant on contract, arising from distinct trespasses or wrongs, is not required to combine them in one action, although, in most cases, he may do so at his election. He may prosecute them separately, subject to the power of the court, in furtherance of justice; and to prevent undue vexation and costs, to order the actions to be consolidated. (Phillips v. Berick, 16 Johns. 136.) That the claim for wages earned and due before the dismissal, and for damages for the wrongful dismissal, constituted two separate and independent causes of action, is clear upon reason and authority. The right to recover the wages was complete and perfect, before the right to damages accrued." The court then proceeds to review the leading cases in that State, as well as some of the leading English cases, approving the doctrine of Secor v. Sturgis, 16 N. Y. 548 (1857), which overruled Colvin v. Corwin, 15 Wend. 557 (1836), and then doubts and denies the doctrine in Bendernagle v. Cocks, 19 Wend. 207 (1838), on authority of which the case in 54 Barb. was decided. The point decided in 19 Wend. was, that "where a party hath several demands or existing causes of action, growing out of the same contract, which may be joined and sued for in the same action, they must be joined; and if the demands or causes of action be split up and suit brought for a part only, and subsequently a second suit for the residue, the first action may be pleaded in abatement or in bar of the second action." This is the identical doctrine announced in the Barb. case, and was followed blindly by the courts of last resort in New York until 1856, in Secor v. Sturgis. The face of the court was set toward the light of reason, and finally in 1881 the doctrine was repudiated in toto. The case in 59 Mo., following the repudiated and overruled case in 54 Barb., seemingly approves the doctrine of that case; but the italicised doctrine of the Barb. case was wholly unnecessary to a decision of the Missouri case; and what Napton, J., who delivered the opinion, said approving it, was merely *obiter dicta;* and this spurious doctrine, it cannot be said, has gained a footing in the jurisprudence of Missouri. In the very last adjudication by the Supreme Court of Missouri (Adler v. Spring, & M. Ry. Co., 92 Mo. 242), it was held where a contract provided for payment by monthly installments and 15 per cent. interest, should be held until final settlement; that the fifteen per cent. constituted a separate cause of action or demand, and was assignable, and that the assignee could maintain a separate action therefor on the contract, the *ratione dicendi* of this case is a refutation of the overruled doctrine of the case in Barb., while it cites the 59 Mo. *supra* as authority, it is careful to approve so much only of the doctrine of that case as maintains that separate causes of action may arise out of a single contract, and that separate suits may be maintained on each. In White v. Smith, 33 Pa. St. 186, the court says, Thompson, J.: "I see no impropriety or difficulty in a party being more than once sued for the enforcement of the same duty or obligation, if he have given more than one contract in different forms for its performance."

The Defense Must be Pleaded.—All the authorities agree that the defense of former adjudication, to be available, must be pleaded, and it must appear precisely by the plea that the subject-matter of the former recovery is identical with that embraced in the latter suit.[24] It is fundamental that the *allegata et probata* must correspond, and the burden of the proof is upon the party setting it up.[25] The test whether a former judgment is a bar, generally is whether or not the same evidence will sustain the two actions. A judgment in one is no bar to the other, unless it appear either from the record or extrinsic evidence, that the precise point was raised and decided

[24] 3 Chit. Pl. 928-9; Phillips v. Berick, 16 Johns. 137; Secor v. Sturgis, 16 N. Y. 553; Perry v. Dickerson, 85 N. Y. 345.

[25] 1 Greenleaf on Ev. § 51; Am. But. Hole, etc. Co. v. Thornton, 28 Minn. 418, s. c., 10 N. W. Rep. 1425.

in the former suit.[26] The trial must have been on the merits. A judgment on a demurrer or a plea inabatement is no bar to the action on the merits.[27]

The Modes of Relief from the Conclusive Effect of a Judgment at Law.—There are but three ways at law to avoid the conclusive effect of a judment: (1.) A motion for a new trial; (2) a motion in arrest; (3) a writ of error *coram nobis* (now supplanted in practice by a motion to vacate or set aside). These are all required to be made in the case, and in the same tribunal where judgment is entered; and if they should be refused, the only remedy left is an appeal, or writ of error *coram nobis* to some tribunal having jurisdiction. In most jurisdictions the time within which the first two may be made is limited to four days, and during the term at which judgment was rendered; but it is held that there is no limitation on the third, which is resorted to most generally for the purpose of correcting some vice in the proceeding in the same tribunal, not brought to the attention of the court during the progress of the case. A party against whom a judgment has been rendered, who has failed to avail himself of one of these steps, is forever concluded as between himself and an adversary, not only as to what in point of fact was, but as well also what could properly have been adjudicated in the cause or causes of action proceeded upon to a final judgment.

SAMUEL P. SPARKS.

Warrensburg, Mo.

[26] Gayer v. Parker, 24 Neb. 643, s. c., 8 Am. State Rep. 227 and note; Le Grand v. Rixey, 83 Va. 862.

[27] Garrett v. Greenwell, 92 Mo. 120.

FIRE INSURANCE—FORFEITURE—ACCEPTANCE OF PREMIUM AFTER LOSS—WAIVER.

PHŒNIX INS. CO. V. TOMLINSON.

Supreme Court of Indiana, September 18, 1890.

An insurance policy contained this clause: "In case the assured fails to pay the premium note, this policy shall cease, and remain void during the time said note remains unpaid after its maturity, and no legal action on the part of this company to enforce payment shall be construed as reviving the policy. The payment of the premium, however, revives the policy, and makes it good for the balance of its term." The premium note not being paid at maturity, the company brought suit on it and obtained judgment, which judgment was paid and satisfied after the property had been destroyed by fire: *Held*, that the company was liable for the loss, since the acceptance of such payment revived the policy.

ELLIOTT, J.: The complaint of the appellee alleges that the appellant issued to him a policy of insurance covering a period of five years; that in payment of the premium the appellee gave the appellant $9.73 in money, and executed a promissory note for $16.39; that the property insured was destroyed by fire on the 1st day of August, 1887; that immediately thereafter he gave the appellant due notice of the loss, and that the appellee performed all of the conditions of the contract on his part. The averment of performance is, however, qualified by specific allegations which read thus: "And the plaintiff admits it to be true that when said premium note became due he did not pay the same; but he would further show that after maturity of the note and prior to the loss, to-wit, on the 25th day of June, 1887, said Phœnix Insurance Company recovered judgment against the plaintiff on said premium for the full amount thereof before one Ezra Martin, a justice of the peace in and for Wayne township, Marion county, Ind.; that the plaintiff procured execution to be stayed by one———offering himself as replevin bail, who was accepted as such by said justice of the peace; that said replevin bail had thus been tendered and accepted before the happening of said loss; that thereafter, on the expiration of the stay of execution to-wit, on October 10, 1887, the said judgment was by this plaintiff fully paid and satisfied to said justice of the peace." The policy contains the following provision: "In case the assured fails to pay the premium note or order at the time specified, then this policy shall cease to be in force, and remain null and void during the time said note or order remains unpaid after its maturity, and no legal action on the part of this company to enforce payment shall be construed as reviving the policy. The payment of the premium, however, revives the policy, and makes it good for the balance of its term." The contention of the appellant is that the complaint is bad for the reason that it is not shown that there was a performance of the conditions precedent on the part of the plaintiff. The theory of the appellant's counsel is that the appellant did not, by resorting to legal proceedings nor by accepting the amount of the judgment rendered on the note, waive its right to insist that the appellee lost his claim to the benefit of the policy during the time the premium remained unpaid. The counsel for the appellee thus outline their theory: "Our contention is not at all that the taking of the judgment on the premium note, and the entering of replevin bail was equivalent to the payment of the note; hence we do not discuss any citations to that point. Our theory of the case is this: We say that when the note went past due the insurance company had a right to declare such policy forfeited for such non-payment, and it likewise had the power to waive such forfeiture, and consider the policy in force; that this waiver may be by conduct as well as by words; that there are certain lines of action or conduct which, in law, clearly works a

waiver of any such forfeiture." It is established law that the right to declare a forfeiture of a policy for the non-payment of premiums may be waived, and that the waiver may be manifested by conduct as well as by words. Sweetser v. Association, 117 Ind. 97, 19 N. E. Rep. 722; Willcuts v. Insurance Co., 81 Ind. 300; Behler v. Insurance Co., 68 Ind. 347; United Life, F. & M. Ins. Co. v. Insurance Co., 42 Ind. 588; Insurance Co. v. Eggleston, 96 U. S. 572; Appleton v. Insurance Co., 59 N. H. 541; Stylow v. Insurance Co., 69 Wis. 224, 34 N. W. Rep. 151; Helme v. Insurance Co., 61 Pa. St. 107. This general rule is too firmly settled to be shaken, so that the only question which is here open to controversy is whether the company did waive the right to forfeit the policy by an acceptance of the premium after the loss had occurred.

It is proper to say at the outset that this case is to be discriminated from such cases as Insurance Co. v. Henley, 60 Ind. 515, and Insurance Co. v. Leonard, 80 Ind. 272, for the reason that in those cases the premium notes were shown to be unpaid at the time of the loss, and it did not appear that the insurance company had subsequently accepted payment, while here there was an acceptance of the premium after the loss occurred. We cannot perceive any valid ground upon which it can be held that an insurance company may accept payment of the entire premium after a loss has occurred, and yet escape payment of the loss. By accepting payment it affirmed the validity of the policy, and tacitly asserted that the policy was in force from the time it was executed. In such a case there is no interregnum in which there was a lifeless policy for the policy is continuous in its nature and effect, and the premium covers the risk as an entirety. It would do violence to the intention of the parties and the language of their contract to declare, as the appellants seek to have us do, that the payment simply revived the policy. It cannot be justly affirmed that the parties meant to revive a policy in a case where, as here, the act which revived it was performed after the loss occurred. The reasonable effect to be attributed to such an act is that the parties meant that the affirmance of the contract should relate back to the execution of the policy. In our judgment, acceptance of the premium after the loss has occurred is a waiver of the right to declare a forfeiture of the policy, and not a mere act of revivor It is not reasonable to assume that the parties meant to do no more than revive the policy and give it force from the time of the acceptance of payment, since, as the loss had already occurred, the insured could acquire no benefit from the revived policy. The only rule which would yield him benefit and give him consideration for his money is that which we adopt. It is a principle of wide sweep that forfeitures are not favored, and within the spirit of this principle such cases as clearly fall. To treat the acceptance of the premium as merely reviving the contract is, in effect, to adjudge a forfeiture, for in the event that we adopt the views of the appellant the result would be the same as to adjudge the policy forfeited. This is clear when it is brought to mind that if the policy is held to be lifeless from the time of default in payment until after the loss, it must also be held that the insured cannot recover anything upon his contract. A construction of the conduct of the parties which will practically produce the same result as a declaration of forfeiture is one which it is the duty of the courts to avoid if it can reasonably be done. It is clear that this construction may be reasonably avoided. It is, indeed, quite clear that such a construction as that for which the appellant contends would be against reason and justice. It is a familiar general rule that a party who accepts and retains benefit from a contract confirms the contract as it was executed. Under the operation of this general rule there is not a revival of the contract, but a confirmation, and we can see no reason why such a case as this should be excepted from the rule. The doctrine we approve produces equitable results. It certainly does so in this case, for it is but just that the company, having accepted the entire premium after the occurrence of the loss should yield the consideration for which the premium was paid. It is not just that the company should retain the premium and give no value in return. The fact that all of the property insured was not destroyed does not affect the question, for the policy is indivisible and continuous. If, to put an illustrative case, the premium should be $500, and the amount of the loss only $50, and the insurance company should enforce payment of the entire premium after the loss occurs, it seems quite clear that it could not escape payment of the loss, and the principle in the real case must be the same as that in the supposed, for the amount cannot change a fundamental principle of law. It was not in the power of the assured to pay part only of the premium. He was bound to pay it all, or lose the benefit of his contract. The rights of the parties are reciprocal. The company was not bound to accept part of the premium, nor had it a right to treat the premium as paid upon part only of the property insured. It was the right of the company to refuse to accept part of the premium, but it had no right to accept the whole premium, and treat it as payment for an insurance upon part only of the property covered by the policy. Having accepted the entire premium, with full notice of the loss, it confirmed the contract as to the whole of the property insured. It had the right to elect to accept or reject the premium, but it cannot accept the entire premium, and yet assert that it is liable only from the time of the acceptance, although the loss occured prior to that time. The provision of the policy we have quoted does not provide that the default in payment shall entitle the company to treat the premium as earned. If it did, we should have a more difficult question. In this instance the premium was not earned, for the period covered by the policy was 5 years, and

the loss occurred within 17 months after the policy was written. There was in fact, at the time of the loss, and at the time of the acceptance of the amount of the judgment, no earned premium beyond that paid in cash; nor is there any recital that default shall entitle the company to treat the premium as earned. There is, therefore no tenable ground upon which the company can justify its act in taking the insurer's money, and yet repudiate liability for the loss. The moment the risk attached the premium paid was beyond recovery by the insured. Standley v. Insurance Co., 95 Ind. 254; Insurance Co. v. Houser, 111 Ind. 266, 12 N. E. Rep. 479. His right is correspondent with his burden. He cannot get his money back, but he can enforce his contract, and his contract is continuous for the period named, and indivisible as to the property described. When the company accepted payment of the entire premium it waived all right to forfeit the policy, for, as the insured can get back no part of the premium paid, neither can the company escape the performance of its part of the contract. It cannot have the benefit, and escape the burden. The only natural and reasonable construction which can be placed upon the conduct of the company is that it elected to waive its right to take advantage of the default in payment. And this is the only legal and equitable construction that can be given to its acts, for it cannot repudiate the policy in part, and confirm it in part. It can no more accept and retain the entire premium without confirming the contract than can the insured recover back the premium paid after the risk has attached. It was in the power of the company to accept or refuse payment. It made its election, and it must abide the legal consequences of that act. It was a voluntary performance, with full knowledge of all the material facts, and the election was complete.

We have studied with care the cases referred to by the appellant's counsel, and we cannot regard them as sustaining the position counsel assume; for we do not believe that in any of them is the doctrine asserted that under such a policy as that before us the insurance company may, with knowledge of the loss, and notice that the assured is affirming the validity of the policy, accept and retain the entire premium, and yet refuse to pay the loss. In Klein v. Insurance Co., 104 U. S. 88, there was no offer to pay the premium until after the death of the assured, and then the offer was refused, the company declining to accept the money, and offering to pay the surrender value of the policy. The policy in the case of Wall v. Insurance Co., 36 N. Y. 157, contained a provision that, in case of default in the payment of the note given by the insured, "the premium shall be considered as earned," and the evidence showed that after the loss the insured offered to pay the premium, and that it was declined. The evidence also showed that before knowledge of the loss the agent of the insurance company agreed that he would not press for payment of the note; that it might lie over for a short time. The court held that there could be no recovery. The court was, as we believe, in error in holding that there was no waiver of payment sufficient to excuse the insured, for there are well-reasoned cases which assert a different doctrine, and among them our own, and one or more in New York. Sweetser v. Association, *supra;* Insurance Co. v. Gilman, 112 Ind. 7, 13 N. E. Rep. 118. But, granting that the decision is sound, it cannot aid the appellant, for the reason that in this instance there was an acceptance of the entire premium with full knowledge of all the facts. In Williams v. Insurance Co., 19 Mich. 451, it was held that where the policy provided that in case default was made in the payment of a premium note, "the premium shall be considered, as earned," acceptance of the premium after knowledge of the loss did not preclude the company from taking advantage of the provisions of the policy declaring that it should be inoperative during the time the premium remained unpaid. The decision rests, for authority, entirely upon Wall v. Insurance Co., *supra*, and we are not inclined to regard it as of controlling influence, for the reason that there is an essential difference between the provisions contained in the policy in that case, and those found in the policy before us. We are, indeed, not convinced of the soundness of the decision, but it is not necessary to do more than decline to regard it as in point, and in this we are fully supported by the later case of Yost v. Insurance Co., 39 Mich. 531, where the court expressed an opinion as to the force and meaning of the provision in the policy to which we have referred. The only case directly in point referred to by counsel, or discovered by us, is that of Joliffe v. Insurance Co., 39 Wis. 111. That case received careful consideration, and the decision sustains the position of the appellee. The court discriminates the case before it from those in which the policy provides that in case of default the payment shall be deemed to be earned, and builds its decision principally upon the ancient doctrine that where there is no risk there is no right to a premium. It is declared that Mr. May's statement of the law is correct, and the court quotes what is said by him in speaking of a contract of insurance, and that is this: "It is, moreover, a conditional contract, for when no risk attaches no premium is to be paid, or, if paid, must in the absence of fraud, be returned to the assured. In point of fact the contract is to pay the premium, on condition that the risk is run, and the refunding of a premium is of frequent occurrence in maritime insurance; and that, too, in cases where it is entirely optional with the assured whether the property insured shall be put at hazard or not, as when the ship is never dispatched by the owner on the projected voyage. The language of Lord Mansfield in Tyrie v. Fletcher, Cowp. 668, is explicit: 'When the risk has not been run, whether its not having been run was owing to the fault, pleasure, or will of the insured,

or to any other cause, the premium shall be returned.' And this principle is alike applicable to all policies of insurance." May, Ins. § 4. The court applied this doctrine to the case before it and said: "But the defendant received the whole cash premium for which the note was given. By so doing it received compensation for the risk covering the time when the loss occurred, and we think it cannot now be heard to allege that at the time of the loss it had no risk on the property insured. The acceptance of the full premium after notice of the loss is entirely inconsistent with the claim that the risk was suspended when the loss occurred." The decision in Lyon v. Insurance Co., 55 Mich. 141, 20 N. W. Rep, 829, while not directly in point, does assert a doctrine which bears strongly upon the case under investigation. In the case referred to, orders for the premium were drawn upon a railroad company, but were not paid, and the court held the insurance company liable, saying, among other things, that "a forfeiture is not favored at law or in equity, and a provision for it in a contract will be strictly construed, and the courts will find a waiver upon slight evidence, when the equity of the claim made as in this case, is, under the contract, in favor of the insured." It is however, insisted by the counsel for the appellant that the case of Bane v. Insurance Co., 85 Ky. 677, 4 S. W. Rep. 787, is opposed to the case last mentioned, but we think counsel are in error, for the Kentucky court puts its decision upon the ground that the assured had not earned the wages which he assumed to assign, and declares that in this respect the case differs from Lyon v. Insurance Co. In Titus v. Insurance Co., 81 N. Y. 410, the court said: "But it may be asserted broadly that if, in any negotiations or transactions with the assured after knowledge of the forfeiture, it recognizes the continued validity of the policy, or does acts based thereon, or requires the insured by virtue thereof to do some act or incur some trouble or expense, the forfeiture is waived as a matter of law; and it is now settled in this court, after some difference of opinion, that such a waiver need not be based upon any new agreement or an estoppel." Other cases assert a similar doctrine. Osterloh v. Insurance Co., 60 Wis. 126, 18 N. W. Rep. 749; Cannon v. Insurance Co., 53 Wis. 585, 11 N. W. Rep. 11; Insurance Co. v. Bowen, 40 Mich. 147; Insurance Co. v. Lansing, 20 N. W. Rep. 22. In the case last cited the court, in speaking of the duty of the insurance company, said: "But it cannot treat the policy as valid to collect the premium, and void for the payment of the losses. The note having been paid after the loss, the acceptance of the money waived the condition of forfeiture in the policy, and it was valid and subsisting at the time of the loss." The case before us falls within the principle declared in the cases cited. The acceptance of the money was after the loss, and after the company knew that the assured was affirming the validity of the policy, and his right to recover the loss. It knew that he did not regard the policy as suspended, and, by accepting the money it confirmed the contract as of the date of its execution. We adjudge that the complaint makes a case sufficiently strong to drive the appellant to answer. Judgment affirmed.

NOTE.—This case is one of those illustrating the despair of the policy-writer. Clearly the intention was to relieve the company from liability should a note, given for the premium, be unpaid at maturity, and a loss happen thereafter before payment. As the company might desire to collect the note it is provided "no legal action on the part of the company to enforce payment shall be construed as reviving the policy." To save this from appearance of harshness, or as an effort to get the premium and escape the liability, it is provided that: "The payment of the premium, however, revives the policy, and makes it good for the balance of the term." Unfortunately for the policy-writer, this show of fairness was not sufficient to make good the intention to collect the premium after default and escape liability should a loss happen pending the collection. A writer who uses "balance" in that connection as equivalent to "remainder" should not be surprised if the courts do not accept his intention as equivalent to a correct expression.

The cases hold with almost unvarying unanimity that acceptance of the premium with notice of a fact which, if insisted on, would work a forfeiture, will waive the forfeiture. The opinion of the court is rich with citations, and the number might be increased.

Under Matthews v. Insurance Co., 40 Ohio St. 135; Tyrie v. Fletcher, Cowp. 668, May on Ins. Sec. 4, and American Ins. Co. v. Story, 41 Mich., the premium ceases to accrue against the insured whenever the insurance ceases in the absence of an express agreement to the contrary.

By this rule, as the policy becomes void on non-payment of any portion of the note, there cannot be a collection of that portion of the note falling due after the default, unless there is special stipulation to that effect. If the note be collected the policy must be held to be restored for the full period, or the company will have had the premium and still be relieved of liability. There are a few cases holding clearly against the Indiana court. The court cites and distinguishes two that the appellant relied on: Williams v. Ins. Co., 19 Mich. 451, and Jolliffe v. Ins. Co., 39 Wis. 111.

A case not cited, which is not readily distinguishable, is Smith v. Continental Ins. Co., 43 N. W. Rep. 810. (Dak. S. C.) In that case the installment note had been paid in full of the principal, but $4 accrued interest was unpaid. The policy had become void by reason of undisclosed mortgages on the insured property, and by additional insurance without permission. After the loss, and pending suit on the policy, the $4 accrued interest was paid to the company, and accepted by it with full knowledge of all the facts constituting the forfeiture. It was held that this did not constitute a waiver of the forfeiture. The court say: "When the premium is earned and forfeiture occurs before the loss, the taking and retaining of the premium is not inconsistent with a defense based upon such forfeiture, and is not evidence tending to show a waiver thereof."

In Schimp v. Cedar Rapids Ins. Co. (Ill. S. C.), 17 Ins. L. J. 703, a premium note was unpaid at the time of the loss. After the loss the company denied liability on account of non-payment of the note. Suit was brought, and pending the suit, the note was paid; and

this the plaintiff claimed was a waiver of the company's right to defend on that account. The court held otherwise. The court say: "The waiver, or estoppel, relied on cannot prevail. It is destitute of that element which is most essential to either. It does not appear, nor is it claimed, that the assured was misled in any manner, to its prejudice by the company accepting payment of the note. Upon the delivery of the policy, and the commencement of the risk, the appellee acquired a present vested right in the premium as an entirety. The payment of part of it was merely postponed, and consequently the company had the right to receive the money. We are clearly of the opinion that the receiving of it did not operate as a waiver."

The fact that in each of these cases the payment was made after suit was instituted does not seem to have had any weight with the courts.

In Cohen v. Continental Ins. Co. (Texas S. C.), 3 S. W. Rep. 296, a premium note was unpaid at time of loss, but an agent of the company had frequently demanded payment of the note. This was held not to keep the policy alive. The court say: "When the contract is such that on default in payment of any installment the insurance shall cease, and the installment shall be considered as earned, the insurer has the right to the premium, although the insurance is forfeited; and hence a demand and payment of the premium is not held a waiver."

These are all the reported cases holding with the appellee, Tomlinson, except those cited in the opinion of the court. They turn, in part, on a differently worded policy from that before Judge Elliott in the above opinion. It may be safely said that the weight of authority on a policy worded like this one, is with this opinion. In addition to those cited by the court, the following are to the same effect: Schreiber v. German-American Hail Co. (Minn.), 45 N. W. Rep. 708; McMartin v. Continental Ins. Co. (Minn.), 43 N. W. Rep. 934; Phenix Ins. Co. v. Lansing, 15 Neb. 494.

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QUERIES.

QUERY NO. 9.

A, by his warranty deed, conveys land situate in Illinois to B. At the time A conveyed he had title to but one-half the land, and never got any release of B. B went into possession of the whole amount conveyed by A and occupied it for five or six years; willed it to his wife as trustee and made her executrix of his will after his death. The executrix and heirs were dispossessed of one-half of premises. Now the question is, as the title or warranty was broken at the delivery of the deed, who is the proper party to sue the executrix or the heirs? Cite authorities, etc. Y.

QUERY NO. 10.

On the first day of January, 1885, A gave a deed of trust to B on his land, and makes D as trustee. On the 15th day of September, 1885, E sues A and gets judgment and issues an execution and sells the land, and F, who is attorney for A, buys the land under the execution sale. F, the attorney, then sells and deeds it to A's wife. In the meantime, Dec. 21st, 1887, G, who is and was a creditor during this procedure, sues A in a justice court on a note for loaned money ($150), and gets judgment against A, and files a transcript on the 22d day of December, 1887, in the office of the circuit clerk.

Question: Can F, as attorney at-law for A, pass a good title to A's wife to the land? If, at this date, A steps in and pays off the deed of trust to B, does the title to A's wife become good, or does the transcript intervene?

HUMORS OF THE LAW.

DEFRAUDING THE SLOT-BOX.—A complicated case was brought into the central police station yesterday afternoon. It was that of a man who had succeeded in beating a "drop-a-nickel-in-the-slot" box on the corner of Third and Jefferson streets. The man who was able to perform this feat was John Lewis, and he is said to have made a thorough study of the subject before risking his nickel. He first bored a hole in the coin and then fastened it to a small black silk thread. He then dropped the nickle in the slot as directed by the sign and drew out a cigar. Seeing that nothing was stated in the directions as to how many times one nickel could be dropped in, he drew his nickel out and dropped it in again. Succeeding the second time, he continued to drop and continued to draw until he emptied the box. By the time he had drawn the twenty-ninth cigar quite a crowd had gathered around him and cheered him on. Their cries attracted officers Schradel and Donahue, who arrested Lewis and took him from the circle in which he had become a hero.

At the station-house the question arose as to what he should be charged with. After several suggestions of robbery, burglary, it was decided to place against him disorderly conduct. He was taken out on bond a little later by some of those whose cries had attracted the police.—*Louisville Courier-Journal.*

A law recently passed in Denmark provides that all drunken persons shall be taken home in carriages at the expense of the dealer who sold the last glass.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ACCIDENT INSURANCE.—A policy of insurance provided that the principal sum should be paid if the insured, from a violent and accidental injury, which should be externally visible, should "suffer the loss of

the entire sight of both eyes, or the loss of two entire hands, or two entire feet, or one entire hand and one entire foot:" *Held*, that where insured was accidentally shot in the back, producing total paralysis of the lower part of the body and entirely destroying the use of both feet, he had suffered the loss of two entire feet, within the policy.—*Sheanon v. Pacific Mut. Life Ins. Co.*, Wis., 46 N. W. Rep. 799.

2. APPEAL—Notice.—A notice of appeal which describes a judgment for the recovery of a specific sum of money is not sufficient to bring into the appellate court a judgment in an action for the recovery of specific personal property.—*Ream v. Howard*, Oreg., 24 Pac. Rep. 913.

3. APPEAL—Objections Waived.—Where a party objects to the reference of a cause, and demands a jury trial, which objection and demand are overruled, but subsequently consents to the appointment of a referee, he will be *held* to have abandoned his former objection and demand, and to have waived a jury trial.—*Smith v. Burlingham*, Kan., 24 Pac. Rep. 947.

4. APPEAL—Record.—The act of 1889, touching the mode of bringing cases to the supreme court, being the only statute now of force on the subject, must be complied with. It confers no authority for bringing up the whole record at the instance of the plaintiff in error. He can bring up such parts only as are specified in the bill of exceptions. To designate the whole record, in general terms, as material, is no specification of the parts.—*Hardee v. Lovett*, Ga., 11 S. E. Rep. 1021.

5. CARRIERS—Passengers—Negligence.—The running of a railway passenger train beyond the usual stopping place at the station, and then pausing a sufficient length of time to reverse the motion so as to back it to the proper stopping place, is not of itself negligence; but whether the pause was so long that it indicated an invitation to the passengers to alight, and whether the backward movement was made without warning while they were alighting, are questions of fact for the jury. —*Sherwood v. C. & W. M. Ry. Co*, Mich., 46 N. W. Rep. 775.

6. CHATTEL MORTGAGE—Description.—In a chattel mortgage, the property in controversy was described as 40 milk cows, and the increase or calves of said cows; 1 gray horse, about 10 years old, 1 bay horse, about 10 years old: 1 sorrel pony, about 4 years old; and 1 mule, about 12 years old—and the mortgage provided that the property should remain in the possession of the mortgagor until default in the payment, and, further, provided that the property was not to be moved from Nemaha county, and the evidence showed that the property in question was levied upon in Nemaha county, as the property of the mortgagor: *Held*, that the description is sufficient under the circumstances of the case, and that the mortgage was not void for uncertainty in the description of the property.—*Scrafford v. Gibbons*, Kan., 24 Pac. Rep. 968.

7. CONSTITUTIONAL LAW—Appeals in Criminal Cases. —The allowance of the right of appeal to citizens of the State at large in all cases of conviction of crimes before a justice of the peace, (How. St. Mich. § 7109), and a denial of such right to citizens of Detroit convicted of similar offenses in the police court of that city, where the sentence imposed does not exceed 20 days' imprisonment, or a $25 fine (Pub. Acts Mich. 1887, p. 389, § 23), does not deprive citizens of Detroit of the equal protection of the laws guaranteed to all citizens of the United States, by Const. U. S. Amen. 14, § 1, as the act providing for appeals from the police court of Detroit operates equally on all persons within its jurisdiction. —*Sullivan v. Haug*, Mich., 46 N. W. Rep. 795.

8. CONSTITUTIONAL LAW — Fences.—The Code, as moulded and modified by general legislation on the subject of fences, has established an optional system of fence law, general in its nature, and of uniform operation throughout the State. This being so, there is no power to legislate specially for two militia districts so as to dispense as to them with the popular vote, provided for in the Code of 1882, the constitution of 1877, declaring that "laws of a general nature shall have uniform operation throughout the State, and no special law shall be enacted in any case for which provision has been made by an existing general law."—*Mathis v. Jones*, Ga., 11 S. E. Rep. 1018.

9. CORPORATIONS — Stockholders. — In an action against a corporation under Gen. St. ch. 76, the individual liability of stockholders for the corporate debts may be enforced upon the application of any creditor who is a party to the proceedings, although the complaint of the judgment creditor who instituted them did not demand any such relief.—*Arthur v. Willius*, Minn., 46 N. W. Rep. 851.

10. COUNTY-SEAT—Petition for Election.—A petition to the board of county commissioners to order an election to relocate the county-seat, when said county-seat had been originally located by a vote of the people of the county, and had remained for more than five years, must contain three-fifths of the names of the electors of the county, as shown by the last assessment rolls of both real and personal property, to be sufficient to authorize the board to order such an election.—*State v. Nickols* Kan., 24 Pac Rep. 955.

11. COURTS — Jurisdictional Amount. — Where a promissory note is for more than $100 principal, the holder may, after remitting by an entry on the note all the excess, bring suit for that sum in the county court, and the court may exercise jurisdiction of the case at its monthly session. The act of 1879 does not deny to creditors this method of reducing their demands so as to prepare them for suit in the county court, whether the jurisdiction is to be exercised at the monthly or at the semi-annual session.—*Stewart v. Thompson*, Ga., 11 S. E. Rep. 1030.

12. CRIMINAL EVIDENCE.—Where the only question is as to the identity of defendant with the man who committed the crime charged in the indictment, and 22 witnesses swear positively as to his identity, a judgment of conviction will not be reversed as unsupported by the evidence, though the trial occurred 5 years after the crime, and though 7 witnesses swear that defendant is not the man who committed it.—*State v. Foster*, Iowa, 46 N. W. Rep. 858.

13. CRIMINAL LAW—Appeal.—The only way the evidence in a criminal prosecution can be made a part of the record is by bill of exceptions. If brought to this court in any other way it will not be considered.—*State v. Tilney*, Kan., 24 Pac. Rep. 945.

14. CRIMINAL LAW—Burglary.—Lifting a latch in order to enter a building is a "breaking," within the definition of burglary.—*State v. O'Brien*, Iowa, 46 N. W. Rep. 861.

15. CRIMINAL LAW—Corrupt Voting.—Where an indictment charges the defendant, a member of the board of county commisssioners, with corruptly voting for and allowing a claim in a sum too large, it is error to permit the introduction of evidence to prove that a warrant had been issued in payment of said claim in a sum larger, dollar for dollar, than the amount of the claim as allowed, without proving that the defendant voted to issue the warrant for said larger sum.—*State v. Spidle*, Kan., 24 Pac. Rep. 965.

16. CRIMINAL LAW—Embezzlement.—In a prosecution for embezzlement, where evidence is admitted tending to prove other acts of embezzlement from the same parties about the same time as the one charged in the indictment, for the sole purpose of showing guilty intent, the court must limit the effect of such evidence to such purpose by instructions to the jury.—*State v. Lewis*, Oreg., 24 Pac. Rep. 914.

17. CRIMINAL LAW—Trial.—Where the trial judge, when overruling a motion for a new trial, puts into the record his views of the case, in which he states that it is possible that defendant may have killed decedent but it is not probable, a judgment of conviction will be reversed.—*State v. Billings*, Iowa, 46 N. W. Rep. 862.

18. CRIMINAL LIBEL.—To constitute criminal libel, it is not necessary that the alleged libelous article reflect upon the conduct of any particular person, but, if

directed against a family it is libelous.—*State v. Brady*, Kan., 24 Pac. Rep. 948.

19. CRIMINAL PRACTICE—Adultery.—Under Code Iowa, § 4008, which makes adultery a crime, declares that though only one of the parties is married both are guilty of adultery, and provides that no prosecution therefor can be begun except on complaint of the husband or wife, an indictment charging defendant with committing adultery with a married woman which does not state that he was married is good, though it does not allege that it was made on complaint of defendant's wife.—*State v. Mahan*, Iowa, 46 N. W. Rep. 855.

20. CRIMINAL PRACTICE—Nolle Prosequi.—The mere entry of a *nolle prosequi*, or the dismissal of an indictment, with the consent of the court, is no bar to the filing of another indictment or information for the same offense.—*State v. Child*, Kan., 24 Pac. Rep. 952.

21. DAMAGES—Exemplary.—It is the settled rule of this State, when not controlled by legislation, that exemplary or punitive damages as a punishment or example should not be awarded in civil actions for injuries resulting from torts where the offense is punishable under the criminal laws.—*Howlett v. Tuttle*, Colo., 24 Pac. Rep. 921.

22. DEED—Conflicting Surveys.—In trover for the value of logs cut from a strip of land which both plaintiff and defendant claimed, it appeared that plaintiff held under a government survey made in 1839, which established the line as plaintiff claimed it. Defendant held under a subsequent survey made in 1877, under an act of congress which recited that the town had never been properly surveyed. According to this survey the land in dispute fell within the description of defendant's deed: *Held*, that plaintiff's title became a vested right under the survey of 1839, in accordance with which he purchased, and that that survey should control.—*Burt v. Bush*, Mich., 46 N. W. Rep. 790.

23. DIVORCE—Alimony.—Under Gen. St. Conn. § 2807, providing that "the superior court may assign to any woman so divorced part of the estate of her late husband not exceeding one-third," where the court finds that the husband's estate consists of realty, and that the nature and condition thereof are such that a division or partition is impracticable and not for the interest of either party, it may, on granting a divorce to the wife, decree that a sum of money be paid her as alimony.—*Benedict v. Benedict*, Conn., 20 Atl. Rep. 428.

24. DOWER — Ante-Nuptial Agreement.— Two weeks before decedent's death, he executed an instrument substantially the same as the antenuptial agreement, with the additional stipulation that he gave plaintiff all his furniture and clothing, and that the $1,000 should be payable in government bonds. This instrument also provided that it should be in full of every claim against his estate, including dower. It also provided that all previous contracts and agreements were thereby revoked: *Held*, that the validity of the old contract, as an antenuptial contract, was not destroyed, and that the new contract merely made an additional gift, so that plaintiff could not waive its provisions and elect to take dower.—*West v. Walker*, Wis., 46 N. W. Rep. 819.

25. EMINENT DOMAIN—Compensation.—In condemnation proceedings, where a part of a distinct tract or parcel of land is taken for public use, special benefits may be considered, because the issue is as to the extent of the damages.—*McKusick v. City of Stillwater*, Minn., 46 N. W. Rep. 769.

26. EQUITY—Boundaries.—At common law, to give a court of equity jurisdiction in cases of disputed boundary, there must be—*First*, a dispute as to the boundary; and, *second*, some equity superinduced by the act of the parties.—*Love v. Morrill*, Oreg., 24 Pac. Rep. 916.

27. ESCHEAT—Executors and Administrators.—Under the statutory provision allowing any person in whose possession property sought to be escheated is found to traverse the inquisition in the court of common pleas, that court, and not the orphans' court, has jurisdiction to determine the matter, even though the traverser is administratrix of the former owner.—*Commonwealth v. Crompton*, Pa., 20 Atl. Rep. 417.

28. EVIDENCE—Declarations.—Statements made by the cashier of a bank while renting and endeavoring to sell its land, that said land was conveyed to the bank in payment of a certain debt, are inadmissible in an action on said debt, not being connected with the business in which he was engaged.—*Sioux Valley State Bank v. Kellogg*, Iowa, 46 N. W. Rep. 860.

29. EVIDENCE—Opinion—Fraudulent Conveyance.—In an action involving the validity of the sale of a stock of goods as to creditors of the seller, it is error to permit a witness, who has knowledge of the facts, to give his opinion as to the honesty or dishonesty of the sale; and the admission of such opinion, being on the vital point of the case, is ground for reversal, though the facts relating to such sale have all been placed before the jury.—*Rindskopf v. Myers*, Wis., 46 N. W. Rep. 818.

30. EVIDENCE—Parol.—Parol evidence is admissible to show that a promissory note for the payment of $10,000, executed by a daughter to her father, and made payable on demand, was in fact executed by the daughter and received by the parent as a mere receipt or memorandum of an advancement made by the parent to the child, and that a mutual understanding was had at the time of its execution and delivery that payment thereof would never be demanded or enforced.—*Brock v. Latimer*, Kan., 24 Pac Rep. 946.

31. EVIDENCE—Parol—Husband and Wife.—Parol evidence is admissible to show whether the debt covered by joint promissory notes of husband and wife was in fact the joint debt of both, or whether it was the several debt of the husband, and the wife was only his surety upon the notes; and if the inquiry involves an explanation of another writing, such as a deed of lease executed to the husband and wife jointly, parol evidence is admissible to show the wife's true relation to that instrument also,—*Schofield v. Jones*, Ga., 11 S. E. 1032.

32. EVIDENCE—Personal Injuries.—In an action against a town for personal injuries sustained by plaintiff's being thrown from a dog-cart in which she was riding with her husband, by reason of its striking an obstruction in the highway, testimony of the opinions of witnesses as to the safety of a dog-cart when used by two riding together in it on ordinary country roads is inadmissible.—*Robinson v. Town of Waupaca*, Wis., 46 N. W. Rep. 809.

33. EXECUTORS AND ADMINISTRATORS.—An executrix, after paying over to the administrator of another estate money which he claimed as assets of said estate, petitioned to have her account corrected so as to show that said money did not belong to said estate. Her petition was refused by the court: *Held*, that such decision barred her from asserting any claim to said money upon the accounting of said administrator.—*In re High's Estate*, Pa., 20 Atl. Rep. 422.

34. EXECUTORS' SALE OF LAND.—At an executors' sale certain of the residuary legatees purchased land and gave a note to the executors. The interest of one of the purchasers was sold on execution under a writ issued by his wife. Prior thereto he had assigned to her his interest in testator's estate. Notice was given by the executors' attorney at said execution sale that the property would be sold subject to some interest or other. But the notice did not show that the interest was said note. The note never was a lien on the land. Moreover the sheriff proceeded with the sale without giving any attention to the notice: *Held*, that, said legatee being insolvent, the amount which he owed on said note could be deducted from his interest in the estate.—*In re Dull's Estate*, Pa., 20 Atl. Rep. 419.

35. FIXTURES—What Constitute.—A party in occupation of a mining claim on public land constructed thereon an engine-house, and within it erected an engine, placed on a frame bolted down to timbers, which were sunk in the ground, and earth tamped around them. The boiler was set on rock-work, and had the ordinary

connections with the engine. The machinery was necessary for the development of the mine. Gen. St. Colo. p. 177, § 225, provides that the terms "lands" and "real estate" shall embrace mining claims: *Held*, that the engine and boiler were fixtures.—*Roseville Alta Min. Co. v. Iowa Gulch Min. Co.*, Colo., 24 Pac. Rep. 920.

36. GARNISHMENT — Chattel Mortgage. — Where the property covered by two separate and distinct chattel mortgages is turned over by the mortgagors, to an agent of both mortgagees, who holds for both jointly, a joint action of garnishment may be maintained against the mortgagees by the mortgagors' creditors, who allege that the mortgages are fraudulent as to them.—*Black v. Dawson*, Mich., 46 N. W. Rep. 793.

37. HABEAS CORPUS—Where an application is made by a prisoner for his discharge upon *habeas corpus*, and the evidence fails to show the commission of any crime on the part of the petitioner, he should be discharged.—*In re Eberle*, Kan., 24 Pac. Rep. 958.

38. INJUNCTION—Conditional Order.—An order conditionally granting a temporary injunction is not operative until a bond is filed in conformity with law and the order of the court or judge granting the same.—*Van Fleet v. Stout*, Kan., 24 Pac. Rep. 960.

39. INJUNCTION — Dissolution.—Where an injunction has been awarded after notice, it is error to dissolve the same in vacation; but, on an appeal from the final judgment in the action, such error is not ground for reversal unless it appears that such premature dissolution was prejudicial to the substantial rights of the plaintiff in the final adjudication.—*Roberts v. Arthur*, Colo., 24 Pac. Rep. 922.

40. INSURANCE—Limitation.—Under a clause in a policy limiting the right of action to a period of "six months after the happening of the death on account of which the action is brought," the limitation does not begin to run until the cause of action matures.—*Matt v. Iowa Mut. Aid Ass'n*, Iowa, 46 N. W. Rep. 857.

41. INTEREST—Unliquidated claim.—One who recovers damages on an unliquidated claim is entitled to interest only from the time his action was brought, and not from the time his cause of action accrued; and this rule is not changed by the fact that such damages were recovered by way of counterclaim to an action on a liquidated claim, in which plaintiff was allowed interest on his damages from the time of their accrual.—*Hewitt v. John Week Lumber Co.*, Wis., 46 N. W. Rep. 822.

42. JUDGE—Disqualification.—The answer of a judge to a petition to restrain him from further acting as judge in a case pending before him admitted that he claimed to be the owner of certain land. The petitioner, who was a party to such pending action, claimed in his petition that said land was involved in the said action pending before the judge: *Held*, that a prohibitory order would issue to such judge, though by his answer he declared that, his attention having been called to the fact that the land claimed by him was claimed to be involved in the suit, he would not further act in it.—*Helbron v. Campbell*, Cal., 24 Pac. Rep. 930.

43. JUDGMENT—Collateral Attack.—A notice of mortgage foreclosure by advertisement erroneously stated the amount then due, claiming too large a sum. The property was sold for the principal, the interest due at the date of the notice, and interest accruing between said date and the time of sale. The mortgagor filed a bill in chancery to set the sale aside. A decree was entered holding the sale null and void, permitting the mortgagor to redeem on payment of the sum due at the date of the notice, and providing that, in default of such payment, the bill be dismissed. The payment was not made, and the bill was dismissed. At the mortgage sale, the premises were bid in by the mortgagee's administrator, and a sheriff's deed given. *Held*, in a suit by the administrator for possession, that, though the decree in the suit by the mortgagor to redeem was erroneous in failing to provide for a resale of the property in case the mortgagor failed to redeem, still he, having made no objection to it, was bound by it, and could not attack it collaterally.—*Huyck v. Graham*, Mich., 46 N. W. Rep. 781.

44. JUDGMENT—New Matter.—Where a person, whom the plaintiff intended to make one of various defendants in an action, procures the judgment rendered in the case to be set aside as to him, upon the ground that no sufficient service of summons was ever made upon him, and afterwards he files an answer in the action setting up new matter and grounds for affirmative relief, which would affect the rights and interests of several of the other parties and other persons, without giving such other parties or persons any notice or any opportunity to appear and defend, the court may, upon the hearing on such answer, without committing material error, refuse to grant the relief prayed for in such answer, and, in effect, dismiss this new proceeding without prejudice.—*Clay v. Hilderbrand*, Kan., 24 Pac. Rep. 962.

45. LIMITATION OF ACTION.—Contract.—Where an agreement embraces several distinct subjects which admit of being separately executed and closed, and the facts show that they were so separately performed, and the compensation agreed upon and apportioned to each of them, such an agreement is to be taken severally, and a right of action accrued as to each of them when the services were rendered.—*Bartel v. Mathias*, Oreg., 24 Pac. Rep. 918.

46. LOGS AND LOGGING—Estoppel.—Plaintiffs agreed to sell their land, and contracted with the vendee that he might cut the logs thereon, but that they should remain plaintiff's property till the price of the land was paid. The contract also specified what marks should be put upon the logs. Defendant with knowledge of plaintiff's contract bought the logs from the vendee, but claimed that he was not liable to plaintiffs for their price because the marks put on the logs were the same as his own private recorded mark, with which all of the logs delivered to him were branded. It did not appear that plaintiff's knew what defendant's recorded mark was: *Held*, that plaintiffs were not estopped from asserting their title against defendant, and could recover from him the price of the logs.—*Long v. Davidson*, Wis., 46 N. W. Rep. 805.

47. MARRIAGE — Annulment.— *Held*, that voluntary cohabitation before the age of consent, does not defeat an action for the annulment of a marriage on the ground of want of age or understanding.—*Eliot v. Eliot*, Wis., 46 N. W. Rep. 806.

48. MORTGAGES—Foreclosure.—A chattel mortgage on certain buildings in course of erection, and upon a leasehold interest, an assignment of the lease, and a contract between the parties in relation to the subject-matter, were executed on the same day: *Held*, that, in determining the rights of parties thereunder, they would be construed together.—*Edling v. Bradford*, Neb., 46 N. W. Rep. 836.

49. MUNICIPAL CORPORATION — Ordinances.— Under Act. Pa. May 23, 1874, requiring the mayor to sign an ordinance or return it to the branch of the council where it originated, the mayor and clerks will not be compelled by *mandamus* to certify an ordinance on the technical ground that it was returned with the mayor's veto to the wrong branch.—*Commonwealth v. Fitler*, Penn., 20 Atl. Rep. 424.

50. MUNICIPAL CORPORATION—Street Assessments.—Section 253 of the Code of Civil Procedure is amended, so far as restraining the collection of an assessment is concerned, by the provisions contained in section 1, ch. 101, Sess. Laws 1887, incorporated into the General Statutes of 1889 as paragraph 590.—*Lynch v. City of Kansas City*, Kan., 24 Pac. Rep. 973.

51. MUNICIPAL CORPORATION—Street Assessment.—The limitation of 30 days within which an action can be brought to defeat or avoid a special assessment for street improvements, under section 1, ch. 101, Laws 1887, is constitutional and valid, and the time when the "assessment is ascertained," and when the limitation commences to run, is when the ordinance levying the assessments, and designating the amount of the

assessment levied upon each particular lot or piece of ground, is published, and takes effect.—*Marshall v. City of Leavenworth*, Kan., 24 Pac. Rep. 975.

52. NEGLIGENCE—Dangerous Premises.—Where the evidence shows that defendant was a city; that plaintiff was injured by falling into an opening in a sidewalk on a dark night; that the opening had been protected by a railing but that, at the time of the accident, the upper part of the railing had been removed, and that plaintiff fell while trying to feel for the railing—it is proper to submit the case to the jury.—*Thiessen v. City of Bell Plain*, Iowa, 46 N. W. Rep. 854.

53. PARTNERSHIP—What Constitutes.—Plaintiff entered into a contract with defendant, the owner of land on which timber was standing, that plaintiff should cut the timber into cord-wood, that defendant should haul it to market, and that the money therefrom should be equally divided between them: *Held*, that this was not a partnership arrangement, but simply a mode for measuring plaintiff's compensation for his work.—*La Flex v. Burss*, Wis., 46 N. W. Rep. 801.

54. PRACTICE—Appeal.—Where, in an action of trespass brought in a municipal court, the jury finds for defendant, on the ground that the obstruction which he removed from his right of way over plaintiff's land, and for the removal of which the action was brought, was an unreasonable one, the circuit court cannot reverse the judgment on appeal, as it is bound by the finding of the jury on the question of the reasonableness or unreasonableness of the obstruction, unless such finding is clearly unsupported by the evidence.—*Johnson v. Borson*, Wis., 46 N. W. Rep. 815.

55. PRACTICE—Consolidation of Actions.—Where each of the heirs of an estate brings a separate suit to charge the administrator and his business partner separately with profits derived from dealings with their ancestor's land, it is proper practice for the trial court to order all the causes consolidated, when it appears that in each case the cause of action is the same, growing out of the same transactions, and against the same defendants.—*Biron v. Edwards*, Wis., 46 N. W. Rep. 813.

56. PRACTICE IN CIVIL CASES.—The superior court may in its discretion call a case out of its order on the docket, the case being founded on an unconditional contract in writing, and no issuable defense having been filed on oath, and may dispose of the same by rendering judgment for the plaintiff. This may be done though, the case having been answered to by counsel at the appearance term, the general issue is to be considered as filed.—*Duggar v. Lackey*, Ga., 11 S. E. Rep. 1025.

57. PRINCIPAL AND AGENT.—A principal is bound equally by the authority which he actually gives, and by that which, by his own act, he appears to give.—*Oberne v. Burke*, Neb., 46 N. W. Rep. 838.

58. PUBLIC LANDS—Unsurveyed Island.—Where the government leaves a small island in a navigable river, lying between the shore and the middle of the stream, unsurveyed, and sells all the surveyed islands, and all the lands on both sides of the river, without a reservation as to such island, the title will be *held* to have passed to the riparain owner.—*Chandos v. Mack*, Wis., 46 N. W. Rep. 803.

59. RAILROAD COMPANY—Crossings.—Section 106, ch. 16, Comp. St., construed; and *held*, that the "causeway, or other adequate means of crossing," which railway corporations are required to make and keep in repair when any person owns land on both sides of any railroad, and when requested so to do, is an adequate means of crossing such railroad track and right of way, by such owner, on foot or horseback, with wagon or carriage, or with domestic animals under his control, but it is not required to be adequate to the free passage of unhearded cattle or other domestic animals wandering unrestrained from one side of the railroad to the other.—*Omaha & R. V. R. Co. v. Severin*, Neb., 46 N. W. Rep. 842.

60. RAILROAD COMPANY—Negligence.—It is the duty of a railroad company to inspect a freight-car, and to see that it is reasonably fit for service before it is received from another company, and, in the event that a freight-car is received with a brake-beam in such a defective condition that a brakeman, whose duty it is to couple the foreign car with those used by the company receiving it, is injured in his attempt to make such coupling, and the brakeman has no knowledge of the condition of such brake-beam, and its condition cannot be readily seen, the company that employs him and received such car in a defective condition is liable for such injury.—*Mo. Pac. Ry. Co. v. Barker*, Kan., 24 Pac. Rep. 969.

61. RAILROAD COMPANY—Negligence.—Where, in such case, the evidence shows that the crossing at which the accident happened was on a much-traveled street, and at the time plaintiff approached it an engine and cars blocked the way, but presently moved off, when the flagman motioned the teams to cross, that the engine was concealed by buildings, but was still near the crossing, and that the noise caused by the escaping steam frightened plaintiff's team, it is sufficient to support a verdict for plaintiff.—*Kalbus v. Abbot*, Wis., 46 N. W. Rep. 810.

62. RAILROAD COMPANY—Persons on Track.—In an action by decedent's wife against defendant railroad company for causing her husband's death, it appeared that the decedent, who was partially deaf, was walking on the track of defendant company, but though he could be seen for some distance, there was no blowing of the whistle or ringing of the bell, and no warning or attempt to check the train until within a few feet of deceased when the whistle was blown twice. Under Code Ga. § 2972: *Held*, that defendant was guilty of wanton and willful negligence, and that in such case decedent's want of ordinary care was no bar to recovery.—*Central R. & B. Co. v. Denson*, Ga., 11 S. E. Rep. 1039.

63. RECEIVER—Appointment.—In an action brought, under Gen. St. ch. 76, § 9, by a judgment creditor for the appointment of a receiver of the property and effects of the debtor corporation, the return of the execution unsatisfied by the sheriff is conclusive so long as it remains of record in force, and cannot be collaterally assailed by inquiries into the conduct of the officer in executing it, or into the existence of any property which he might have levied on by virtue of it.—*Spooner v. Bay St. Louis Syndicate*, Minn., 46 N. W. Rep. 848.

64. REPLEVIN—Assignment for Benefit of Creditors.—Where one purchases goods with the fraudulent intent not to pay for them, and afterwards makes an assignment for the benefit of creditors, the vendor can replevy them without first making a demand upon the assignee.—*Koch v. Lyon*, Mich., 46 N. W. Rep. 779.

65. REPLEVIN—Demand.—In actions of replevin, a demand for the property before suit is not necessary where the defendant's possession was acquired wrongfully, or where, although it was rightful in its inception, he has subsequently wrongfully converted the property to his own use, or where in his answer he claims a right to do it in himself, and demands its return.—*Guthrie v. Olson*, Minn., 46 N. W. Rep. 853.

66. SALE OF SEED WHEAT.—Upon the facts in this case, it is *held* that the plaintiff was a "party furnishing" seed wheat to one B, within the meaning of section 21, ch. 39, Gen. St. 1878; that the note given by B to plaintiff for the value of said wheat was a "seed grain" note, and the amount thereof a valid first lien on the product of said seed.—*Warder-Bushnell & Glessner Co. v. Minnesota & E. E. Co.*, Minn., 46 N. W. Rep. 773.

67. SPECIFIC PERFORMANCE—Good Faith.—A contract under which plaintiffs had the right to compel defendant to close the windows in a party-wall on giving a year's notice and contributing their share of its cost will not be specifically enforced in their favor after they have broken their part of the agreement to furnish defendant's building with suitable sewer connections, in consideration of which agreement defendant had surrendered an easement in plaintiff's land.—*Appeal of Phillips*, Pa., 20 Atl. Rep. 426.

68. STATUTE—Construction.—The rule of construction that effect is to be given to all the words of a statute forbids that two provisos should be treated as having no more scope or significance than one of them would have if standing alone. It is better to wait for legislative amendment than to arbitrarily reject one of the provisos as senseless or superfluous.—*Smith v. Davis*, Ga., 11 S. E. Rep. 1024.

69. STATUTE—Ferries.—Long after the license and establishment of a ferry the legislature, by general law, provided that the county courts should not license a ferry within a half mile, in a direct line, of one already established: *Held*, this general law, so far as it applied to such existing ferry, did not create in it the right to a perpetual monopoly, but was repealable at the will of the legislature.—*Wheeling Bridge Co. v. Wheeling & Belmont Bridge Co.*, W. Va., 11 S. E. Rep. 1009.

70. SURVIVAL OF ACTIONS—Fraud.—An action by the husband's heirs at law against his widow for fraudulently destroying his title deeds to land and procuring the title in her own name does not survive defendant's death at common law, nor under How. St. Mich. § 7897, providing that "actions for damages done to real or personal estate" shall survive, for the statute includes only those cases in which the injury results from the direct wrongful act of a person upon the property.—*Stebbins v. Dean*, Mich., 46 N. W. Rep. 778.

71. TAX LIEN—Foreclosure.—In an action to foreclose a tax lien, the owner of the equity of redemption is a necessary party.—*Alexander v. Thacker*, Neb., 46 N. W. Rep. 825.

72. TAX-SALE—Petition.—In a suit to collect delinquent taxes on real estate bid in by a county, under chapter 39 of the Laws of 1877, each tract of land or town lot should be described in the petition, to give the court jurisdiction over the subject-matter. Where a petition is so essentially defective as to show no description of the land against which a decree was rendered for alleged taxes, *held*, that such judgment and decree as to that particular tract of land, not described in the petition, is void for want of jurisdiction.—*Doty v. Bassett*, Kan., 24 Pac. Rep. 944.

73. TRIAL—Demurrer to Evidence.—Where in the trial of an action a demurrer is interposed to the plaintiff's evidence, on the ground that it does not prove any cause of action, *held*, that unless there has been a total failure upon the part of the plaintiff to prove a case, or some material fact in issue, the demurrer should be overruled.—*Wilson v. Beck*, Kan., 24 Pac. Rep. 957.

74. TRIAL—Instructions.—Though the charge of the court, construed as a whole, be in the main correct, yet, for errors or inaccuracies therein which may have misled the jury, the trial judge may grant a first new trial, and this court generally will not control his discretion in so doing.—*Higginbotham v. Campbell*, Ga., 11 S. E. Rep. 1027.

75. TRIAL BY COURT—Findings.—A complaint contained three counts, alleging three entirely separate and distinct causes of action, each of which was put in issue by the answer. The court found on the issues under one count alone, and rendered judgment thereon in favor of the plaintiff: *Held*, the omission to find upon the issues presented by the other two counts is no cause for reversal.—*Hooker v. Thomas*, Cal., 24 Pac. Rep. 941.

76. TRIAL BY COURT—Findings.—Where the only issue presented by the pleadings to recover upon a promissory note is whether the defendants ever executed the note, and the court finds as a fact that the defendants never executed or authorized the note to be executed for them, it is error, in the absence of any amendment to the pleadings, for the court, in order to show that the defendants are estopped from denying the execution thereof, to receive evidence and make findings showing that, subsequently to the execution of the note, the defendants, by their acts and declarations, are estopped from contesting their signatures, or their liability upon the note—*Newby v. Myers*, Kan., 24 Pac. Rep. 971.

77. TRUST-DEED—Construction.—A deed of a large amount of property was made to certain persons named, in trust "to convert the same into money (except as herein excepted) as rapidly as judicious management will permit, and out of the proceeds to make the payments hereinbelow directed; * * * and in further trust to found and endow, at a cost of $540,000, an institution to be called 'The California School of Mechanical Arts.' * * * The institution shall be founded and endowed under the direction of [six persons named], who are directed to acquire the site thereof, and to form a corporation, the only incorporators being themselves; to own, control and manage the said institution, the members of said corporation never to exceed seven, and vacancies in the membership to be filled from time to time by the survivors:" *Held*, the persons last named, and not the trustees, are to have the active control of the founding of the institution, the selection and acquiring of the site, the erection and furnishing of the buildings, and the control of the expenditures. The power and duty of the trustees end with furnishing the money therefor.—*Floyd v. Rankin*, Cal., 24 Pac. Rep, 936.

78. TRUSTS—Conveyance by Trustee.—Where F furnishes money to C to purchase a piece of land for him, (F), and C purchases the land with F's money, and, without the knowledge of F, takes the title in his own name, C is the agent of F in the transaction, and holds the land in trust for F. If, afterwards, and before conveying the land to F, C makes a general assignment for the benefit of his creditors, and then deeds the land to F, and such deed is at once recorded, and C's assignee then deeds the land to H: *Held*, that the deed of C to F conveying the legal title to him, being on record at the time of the transfer of the land by the assignee to H, imparts constructive notice to H; and, in an action of ejectment by F to recover the possession of the land from H or his grantees, F should succeed.—*Martin v. Fix*, Kan., 24 Pac. Rep. 954.

79. TRUST—Evidence.—In an action to declare the holder of the legal title to real estate trustee for the equitable owner, a running personal account between the parties, in no way connected with the trust, is not proper matter of defense—*Fitzgerald v. Hollan*, Kan., 24 Pac. Rep. 957.

80. VENDOR AND VENDEE—Measure of Damages.—In an action by the vendee for the breach of an executory contract for the sale of land the measure of damages is the difference between the value of the land and the price agreed upon; and the value of the use of the land for the period during which the payments were to have been made cannot be added, for such value is an element of a correct estimate of the value of the land.—*Muenchow v. Roberts*, Wis., 46 N. W. Rep. 802.

81. WIFE'S SEPARATE ESTATE—Estoppel.—A wife's separate property may become subject to the debts of her husband, in case he be permitted to deal with it, and obtain credit upon it as his own, with her knowledge and consent.—*De Votie v. McGerr*, Colo., 24 Pac. Rep. 923.

82. WILL—Construction.—A testator devised land to one for life, with remainder in fee to his children. The devisee died without issue: *Held*, that the remainder passed to the residuary legatee.—*In re High's Estate*, Penn., 20 Atl. Rep. 421.

83. WILL—CONSTRUCTION.—A will provided that the residuary estate should be divided into five equal parts, one of which should be divided among the children of testator's brother; one among the children of his sister; one should go to another sister; one to another brother; and one to a niece: *Held* error to distribute said estate equally among the testator's grandchildren.—*In re High's Estate*, Penn., 20 Atl. Rep. 423.

84. WITNESS—Refreshing Memory.—A witness should not be permitted to use a memorandum to refresh his memory, unless such memorandum was made at or near the time the transaction occurred.—*Weston v. Brown*, Neb., 46 N. W. Rep. 826.